THE OFFICE AND DUTIE OF EXECUTORS.

OR A TREATISE OF WILS and Executors, directed to Teſtators in the choiſe of their Executors and Contrivance of their wills.

With direction for Executors in the execution of their Office, according to the Law, and for Creditors in the recovery of their debts.

Expreſſing the Duty, Right, Intereſt, Power and Authority of Executors, and how they may behave themſelves in the office of Executorſhip.

With divers other particulars very uſefull, profitable, and behovefull for all perſons, be they either Executors, Creditors, or Debtors.

Compiled out of the Body of the Common-law, by *Thomas Wentworth*, late Bencher of *Lincolnes* Inne

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The third Edition, Corrected and inlarged.

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The Preface.

AMIDST the Readers of theſe Diſcourſes; ſome not yet unfriendly may aske, perhaps, *Quorſum hæc*, or *Quorſum ſic:* Why have we a Tractate and Diſcourſe legall; or why in Engliſh, and not rather in the Law language? To whom, yea, alſo to others, perhaps leſſe inquiſitive, it will bee, as I thinke, a thing not unpleaſing to heare ſome reaſon rendered, why I have ſet my head and hands to this worke ſo little in uſe with thoſe of our profeſſion; why alſo in Engliſh rather than in the language, wherein our volumes of

Law are for the moſt part, and well-nigh wholly written.

Firſt, for the matter, *viz.* my thus commenting or making a tractate upon a legall theme.

1. I have long and ſtrongly conceived that the more Nobles, Gentlemen and others, ſhall bee acquainted with the Law of the Land, and the juſtneſſe, equitie, prudence and providence thereof, the more they will love it and affect it; *Ignoti nulla cupido*, the want of knowledge of it cauſeth the leanneſſe of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a meane as well to advance it in their eſtimation, as to advantage them by it.

2. I have long thought that wee who are the Profeſſors of our Law have beene more wanting to it than to theirs, the Civillians and Canoniſts, who have written very many volumes: *Spartam quam nactus*

Ius es, hanc exorna, hath been ſaid of old, and ſhould bee aſſayed anew.

More wanting than others before us of our owne profeſſion have we alſo been as I thinke: yet as of old *Britton*, *Glanvill*, *Bracton*, beſides not printed, *Fleta* and *Ingham*, did lead the way; ſo ſince Maſter *Littleton*, and more lately, Sir *Germin Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitchin*, Sir *Henry Finch*, *Dalton*, have troden this path; ſo as it cannot be taxed with novelty or ſingularitie. I mention not relaters or reporters of Judgements and reſolutions, nor meere abridgers, nor Authour of Bookes of Entries, expreſſing formes of Declarations and Pleadings, &c. Becauſe theſe have trodden another, though for the Students and Profeſſors of the Law, a very profitable path. 3.

The tax & increpation of our late learned, and judicious Soveraigne, 4.

upon

King *Iames* in his Preface to his Booke against *Tobacco.*

upon us the Profeſſors of the Engliſh Law, as being wholly in effect addicted to our owne private gaine and advantage, with neglect of the publike, had ſome ſtrong operation upon mee, howſoever upon others, ſetting for divers yeares paſt my pen on worke, ſpecially in Summer vacations upon divers particular ſubjects, whereof this is one and the firſt borne.

5. To this I may adde the Crowns expectation of ſomewhat legall to bee publiſhed and ſet forth from time to time, as appeares by the ſpeciall Patents ſucceſſively granted, and renewed for the ſole printing of Bookes of Law. There is one ſuch in force at this preſent, and another long hath been in remainder and expectancie to take effect upon the expiration thereof.

6. And now to adjoyne *Sic* to *hæc*, *viz.* the reaſon of my Engliſh writing

ting to that of my writing upon a law theme. Firſt, receive the ſaid late Kings judgement touching both, expreſſed in one of his ſpeeches printed. Thus I wiſh, ſaith he, the Law written in our vulgar language; For now it is in an old mixt and corrupt language, oneiy underſtood by Lawyers, whereas every ſubject ought to underſtand the Law under which hee lives,&c. March 1609. *Note.*

Herein, *Andrew Horne*, one ſometime of our profeſſion, agreeth with the ſaid late King, ſaying, *Abuſio eſt que les leges oveſque lour encheſons, ne ſoient ſcæus & conus del touts:* It is an abuſe, ſaith he, that the lawes with their grounds bee not knowne by all. *Ergo*, to be in a tongue underſtood by all. 7. In his Mirrour of Juſtice.

More plainely and fully doth that our both well learned and well deſcended Saint *German*, ſing in conſort with our ſaid late ſcientious King. For hee firſt brings in 8.

the

Lib. 1. cap. 24. the Doctor of Divinitie, ſaying, that hence-forth he will take more paine than before he had done, to know the lawes of England; for that knowledge is *Multum neceſſaria & clericis & laicis, imo omnibus in hoc regno commorantibus, etiam in foro conſcientiæ.* And this being in his firſt Booke written in Latine: after writing his ſecond Book in Engliſh, he expreſſeth that hee ſo did for this reaſon, *viz.* To the end that it might bee underſtood by all.

9. Which of us hath not heard it objected, that wee the Profeſſours of the Law ſeeke to hide and ſecreat the knowledge therof under this dark and diſtaſted language, wherein the law is for the moſt part written, not that I hold it any juſt excuſe for the neſcience or negligence of any, that our Books are not in Engliſh. Since, firſt, it were eaſie for any diligent and intelligent man, ſpecially if acquainted

ted with the right French language, to underſtand our broken or brackiſh French in a few dayes. Secondly, there be both Statutes and ſome other law-bookes in Engliſh, which are neglected by the moſt. Thirdly, though care hathbeen in Parliament in *Edward* the third his time, that Lawyers ſhould plead, that is, argue and debate cauſes in Engliſh, which was often deſired by the Nobles and Commons, till at laſt aſſented and enacted; and in Queen *Maries* time care was taken that the Commiſſions of Purveyours ſhould bee in Engliſh, to the end that all ſubjects from or of whom they would take, might both ſee them to bee perſons authoriſed, and ſo alſo in what manner they are directed to uſe their authority, according to the Princes pious and princely care that his ſubjects ſhould not be abuſed by his officers: Yet for this affaire, of having all the Law-volumes

36. Ed. 3. cap. 15.

2. & 3. Ph. Mar. cap. 6. in fine.

lumes ſpeake Engliſh, I have not heard nor read of any deſire or endevour in Parliament. Fourthly, If the Annals and Reports were in Engliſh, they are ſo replete with debates about formes of Writs, Returnes, Pleadings, Eſſoignes, Imparlances, Protections, Vouchers, Ayd-priers and Counterplees of both, and the like, as would eaſily diſtaſte and diſcourage any not intending to profeſſe and practiſe the law, from verſing much in them, or paſſing through them. This therefore, as I think, would not much effect the expreſſed deſire.

10. The thing in my judgement fit and fruitfull to produce that good effect, would be to have extracts of materials of the Law; and that not without ſome good choice and ſelection, compoſed in way of diſcourſe, or tractate expoſitory, and that in Engliſh.

11. I cannot well ſee or comprehend

hend how any one legall part or theme may be more uſefull to and for the generality of men, and conſequently more generally expetible and wiſhed for, than the office of executors. For who almoſt is there, who either is not, or may not be an executor or adminiſtrator, or at leaſt hath not, or may not have to doe with them, either to receive from them, or to pay to them debts or legacies? Or who is there above *Forma pauperis* that may not be a teſtator, or Will maker, to the guidance of whom even in the choice of his executors, and contrivance of his will, it cannot but be materiall to know the office and duty, the right and intereſt, the power and authority of executors, yea, of each one executor where there bee divers; yea, to know who may be made an executor, who not; who can make one, who not; how hee may be faſhioned, generally or ſpecially; what

ſhall

ſhall come to him, what cannot be given from him; yea, what goods or chattells ſhall goe from him, though not given from him. Beſides the knowledge for thoſe others neceſſary of the ſafeſt wards or locks for executors. Their *Scilla* and *Charibdis*, and the beſt advantage for creditors, &c. towards or againſt them. To me conſidering what parts of law were moſt behovefull to bee communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the firſt and leading place. Thus mine owne thoughts. But how farre this diſcourſe may be profitable to any, and to how many, *aliorum ſit judicium.* How many know no more of theſe, than of the way of a ſhip upon the Sea?

12. Laſtly, theſe are not intended for the learned of our profeſſion, who have drawne or can draw out of

of the ſame fountaine which I did, and ſo need not my helpe; but for their ſakes who are not profeſſors of the Law: yet ſo as if any young Students may in any part receive fruit by my labour, I ſhall not grudge or repine at their ſo doing. *Bonum quo communius, eo melius.*

The end of the Preface.

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THE OFFICE OF EXECVTORS.

THE things considerable touching Executors, may all in effect be reduced to these three Heads, viz. *Introduction.*

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the first, I intend their creation, or constitution, with the incidents thereto. By the second, their Interest, Fruition, or Possession. By the third, their Managing and execution of their Office. This last was, and is the thing principally in my intention, and the chiefe aime of these Discourses; but necessarily it must have some Ingredients, some Concomitants, and some Consequents; as he that travelleth from *London* to *Yorke* to speake with *I. S.* must needes passe by and thorow other Townes and Villages,

and ſpeake with divers other perſons in his journey and returne, To come firſt to the firſt; therein we will conſider theſe ſixe things.

CHAP. I.

1. *Whether an Executor and a Will be ſuch Relatives, that one cannot be without the other; and therein of the ſeverall kinds of Wills.*
2. *How, and by what words an Executor may be made and created.*
3. *How he may be in ſpeciall manner (different from the generall) faſhioned, limited or qualified.*
4. *Who may make, or be made an Executor, and who not.*
5. *What one may give or bequeath by Will, what not.*
6. *How a Will or Executor once made, may be unmade, and what ſhall amount thereunto,* viz. *to a revocation totall or partiall, what to new Publication.*

Of the relation betweene a Will and an Executor.

AS to the firſt, the very name of Executor purporteth in the generall, one that is to execute ſomewhat, or to whom the execution of ſomewhat is committed, or recommended. In our particular therefore, an Executor of a Will, muſt needes be ſuch an one to whom the execution and performance of another mans Will after his death is commended, or committed: Or who is conſtituted and authorized by the Teſtator, or Will-maker, to doe him that friendly office. Hence it followes neceſſarily, that a Will is the onely bed wherein an Executor can be

be begotten or conceived, for where no Will is, there can be no Executor. And this is so conspicuous, and evident to every low capacity, that it needs no proofe nor illustration. On the other side, though much be written in name of a Will, many Legacies bequeathed, and many things appointed to be done: Yet if no Executor be named, here is no Will; for these two be so relative, and reciprocall, as that one cannot be without the other; if no Will, no Executor; if no Executor, no Will. Yet here two Cautions are to be affixed. 1. That a mans minde, will, and intent, touching the disposition of his goods, being declared, although for want of naming an Executor he dye intestate, so as Administration is to be committed: Yet for that here is not onely an inchoation or inception of a Testament, but so farre a progression therein, as *Testatio mentis*, that is, the manifestation of the party deceased and owner of goods; therefore this minde and intention of the Intestate being notifyed and made knowne to the Judge, who is to commit Administration, is usually annexed (as I take it) to the Letters of Administration, and meete so to be, as a direction, for, and to the Administrator, as well as the Will fully, and perfectly made, but refused to be proved by the Executor, which is usuall. Another Caution is, that where a man seised of Land in Fee-simple, disposeth the same, or part thereof by his Will in Writing, this standeth good for the whole or part, according to the difference of Tenure, although no Executor be named; so as the party dyeth Intestate, and Administration is to be committed as touching his goods, and yet hath a Will as touching his Lands.

Plowd. com. 185. a. in Woodw. and Dareies Case, so expressly said.

Testamentum quasi testatio mentis.

This may ſeeme ſtrange, that the reaſon thereof is an Act of Parliament, inabling to diſpoſe of Land by Will in writing. And for that Land, is not properly Teſtamentary, neither hath the Executor (if any be) any thing to doe or intermeddle therewith; and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this deviſe or diſpoſition of Land by Will. So as, though where there is not *Teſtatio mentis*, there is not *Teſtamentum*; yet may there be the firſt without the latter.

Having ſeene that bequeſts of Legacies without making of Executors, doth not amount to a Will, Let us now conſider, whether the ſole making of Executors in the name of a Will, without giving any Legacy, or appointing any thing to be done by his Executors? Whether, I ſay, this be, or amount unto a Will or nor? Since hereupon the matter nothing is willed, and conſequently nothing reſts to be executed by the Executors, whoſe Office, as hath beene ſaid, is to execute the Will, Minde, and Intent of their Teſtator, and *Ubi non eſt Teſtatio mentis, non eſt Teſtamentum*, ſaith the *Canoniſt*. For anſwer hereunto, confeſſing that indeed to be the Office of an Executor, I yet conceive confidently, that in the Caſe above put, there is a good Will, and as a Will it is to be proved and approved, for theſe Reaſons. Firſt, for that the maine and principall part of an Executors Office, and that which moſt concernes the ſoule of the Teſtator (as our Bookes ſpeake) is the payments of his debts. Now, who knowes not, but that the very making of an Executor, is the conſtituting of ſuch a perſon, who is to pay all

Sum. Silv. fo. 32. b.

all debts; and for that cauſe and end, principally is to have, and enjoy all the goods and chattels of the Teſtator, and all ſummes of money to him owing, as the naming of *A.* and *B.* Executors is by implication a gift, or donation to them of all the goods, chattells, credits, and perſonall eſtate of the Teſtator, and the laying upon them an Obligation to pay all his debts, and making them ſubject to every mans ſuite and Action for the ſame. And if the Law ſpeake thus much ſenſe; *Quod neceſſario ſubintelligitur, non deeſt*; What need then the party expreſſe it in his Will? If he had willed more than this, as to have given this or that in way of Legacy, it had beene needfull for him, ſo to have ſet downe in his Will, but there is no meere neceſſity that every man ſhould give Legacies: the eſtates of many will not doe more than pay their debts, nor oft times ſo much, ſo as if they ſhould give any Legacy, it muſt be a dead and void gift. And ſuppoſe a man have much more, and intendeth all to his wife, brother, or ſiſter, or other friend, his debts being by ſuch perſon paid ſince the very making of that party Executor, without any more, amounteth to thus much, and effecteth this; What needeth then more words? *Fruſtra fit per plura, quod fieri poteſt per pauciora*; as we often ſpeake touching legall paſſages; It is needleſſe to write foure lines where two be ſufficient. Nor is *Teſtatio mentis* here wanting; ſince the Teſtator hath made knowne who ſhould have the Adminiſtration of his goods for payment of his debts, and it is to be preſumed he had no more ſpeciall Will, ſince he did not declare more, but left his Executor further to have and doe, *Prout lex poſtulat*: And who can ſay, here

is nothing to execute? is the suing for, and collecting of debts due to the Testator, and the payment of debts owing by him nothing? Nay, it is rather *in hoc negotio*, the *Unum necessarium*. Besides, the making of an Executor is a designement of a person to be the Testators assigne, to whom, and by whom divers things may be feasible by vertue of covenants, bonds, or other assurances, as after where we come to shew how the Executor represents the person of the Testator will appeare. Also of one, who, as our Bookes often speake, is to dispose the Testators goods for the best advantage of his soule, but instead of that (since as the tree falleth, so it will lye or rest) I will say, as is most for the honour and reputation of the Testator.

Of the kinds of Wills.

4. *H.* 6. 1. 10. *E.* 4. 1. If it be written and brought to, and approved by the Testator in life, it is a Will in writing. 14. *H* 6, 5, *vide* 5. *H* 5. 1. *M.* 15 & 16. *Eliz.*

NOw Wills are of two kinds, or may be two wayes made, *viz.* either by writing, or *Nuncupative*; that is, by words not put in writing, during the Testators life; for after the Testators death, this *Verball* Will must be reduced to writing, and have the seale of the Ordinary, or Judge spirituall thereto affixed; and then is it as effectuall, and of as good validity, as if it had beene in writing in the Testators life time; and so doth the Common Law allow and approve thereof. But I advise all to make Wills by writing, and not to leave them to the doubtfull fidelity, or slippery memory of witnesses: for, as of Leases Parroll hath beene said, that they be Leases perjured, or of perjury:

So of Wills Parroll may be feared. Besides, many times a man doth speake and declare this

or

or that, as part of his Will, which his wife, child, or friend diſſwading, he letteth that purpoſe and part of Will to fall, and departs from it: Yet witneſſes wiſhing it to ſtand, will perhaps affirme it as part of the Will. As for a Will, gift, and diſpoſition of Land of inheritance, if it be not fully written before the death of the Teſtator or Doner, ſo farre (at leaſt) as concernes the diſpoſition of Land, it cannot be for that part made good, by reducing it to writing after his death, as for goods and chattels it may. Yet if it be written before the death of the Teſtator, though it never be brought to him, or reade to him, after the writing thereof, it is good enough; and that not onely for Land, as the Caſe in King *Ed.* 6. his time was, but alſo for goods and chattels, ſo as there be an Executor named. But whether ſhall we ſay, that this is a Will *Nuncupative* or in writing? And ſurely I thinke, that this is a Will in writing, and not verball onely, though it want ſubſcribing; for we know, that many cannot write their names, but onely markes, and what is that? Nay, ſuppoſe one want hands and cannot write ſo much as his name; yet doubtleſſe this man may make a Will in writing, that being written by his direction, as his Will which he dictated: nor is the ſubſcribing of the name of the maker, any eſſentiall part of a Deede, much leſſe of a Will, which needes not ſealing as a Deede doth. Now put we the caſe on the other ſide, that many Bequeſts or Legacies be named in a Will, and many things expreſſed to be done, but no Executor is named in the writing, onely by word of mouth, *A.* and *B.* be named Executors: This I thinke confidently is no Will in writing, but *Nuncupative* onely; for

6. E. 6. By. 72.

that one eſſentiall part of the Will, *viz.* the making of Executors, is wanting in the writing. Nay, the appointing of him Executor, who is named in a note, left with *A. B.* is no ſufficient making of an Executor, ſaith the *Summiſt.* And of ſuch *Nuncupative* Will, Maſter *Perkins* reaſonably ſaith, that it properly hath place, when one ſuddenly taken with ſickneſſe violent, dares not ſtay the writing of his Will, for feare of prevention by death; and therefore prayes his Curate and others, to witneſſe what his Will is. To this Will not written, there muſt be ſeven witneſſes, and ſuch as come not by chance; but are eſpecially called for that purpoſe, ſaith the *Summiſt.*

Tit. de Teſti. Summ. Silv. fo. 443. b. So if he ſurvive and live long time, not cauſing it to be written, or atteſted by witneſſes; me thinkes it ſhould not ſtand as his Will. *Idem ſupra fol. 444. b.*

What ſhall amount to a making one Executor, or what words requiſite thereunto.

HAving before made it to appeare, that the being of an Executor, is an eſſentiall part of a Will, and ſo *de eſſe*, and not *bene eſſe*, onely of a Will or Teſtament. Let us now ſee, Firſt, by what words an Executor may be made. Secondly, *De modo*, In what manner it may be done. How the power and authority of Executors may be limited or divided. As to the firſt, though one doe not expreſſely by Will, name or appoint any to be Executor: Yet if by any words or circumlocution, he recommend or commit to one or more, the charge and office which pertaines to an Executor, it amounts to as much as the ordaining or conſtituting of him or them to be Executors. As if he declare by his Will that *A. B.* ſhall have his goods after his death to pay his debts, and otherwiſe to diſpoſe at his plea-

pleasure, or to that effect; By this is *A. B.* made Executor, as was conceived by the Judges, in the late Queenes time. And long before that, was it held, that if one doe onely will that *A. B.* shall have the Administration of his goods, he is thereby made Executor. Yea, in the said late Queenes time, one giving divers Legacies, and then appointing that his debts and Legacies being paid, his wife should have the residue of his goods; so that she put in security for the performance of his Will: By this without more, was she an Executor, as was held by three *Just. viz. Manwood, Harper,* and *Mounson,* in the Lord *Dyers* absence. And so also where an Infant was made Executor, and *A.* and *B.* Overseers, with this, that they should have the rule and disposition of his goods and payment, and receipt of debts, untill the full age of the Infant; by this were they held to be Executors in the meane time. And if *A.* be made Executor, and the Testator after in his Will, expresseth that *B.* shall Administer also with him, and in aide of him: Here *B.* is an Executor as well as *A.* and if *A.* refuse, *B.* alone may prove the Will as Executor; notwithstanding it be onely said, that he shall Administer with *A.* and in aide of him. Thus many wayes, and by divers words of implication, one may be made Executor, although not expresly so named by the Will. But if *A.* be made Executor, and *B.* a Coadjutor, without more, He is not by this an Executor with *A.* as in King *H. 6.* his time was held, nor hath such Coadjutor, or an Overseer any power to Administer or intermeddle, otherwise than to counsell, perswade and advise; yet I thinke he may, and in conscience should so doe; and if that

If *A.* be made Executor, & to him and *D.* some goods be devised to dispose for his soule, *D.* is by this an Executor for these.

39. *H.* 6. 27. *b.* 98. *M.* 15 & 16. *Eli.* 21. *H.* 6. 6. 7

21. *H* 6. 6. 7. 21. *H.* 6, 6. 34. *Ed.* 3. *F. Exe,* 121 29. *Ed.* 3. 39

that will not prevaile to rectifie negligences, or miscarriages in Executors, he shall well performe the trust reposed in him, if he complaine in the Spirituall Court, or Court of Conscience; and it is reason as I thinke, that so doing upon just cause, his charges be borne out of the Testators state, or the Executors purse, who otherwise would not be reformed.

How an Executor, or his Executorship may be limited or qualified in speciall manner, different from the generall.

NOw let us see how this making of an Executor may be specially qualified. And first, the time may be limited, when he shall begin to be Executor, and that, either certainely, or with some reference ro contingency. Secondly, the creation may be conditionall. Thirdly, it may be partiall, or dividedly, and not entirely.

As to the first, one may appoint *Io. At.* to be his Executor a yeare or more time after his death, and this is good. So also, if *A.* appoint *B.* his sonne to be his Executor when he shall come to his full age; and in the meane time he dyeth Intestate. Againe, one may make and appoint the Executors of *A.* to be his Executors; and then if he die before *A.* he is Intestate, untill *A.* die. This creation may also be conditionall, and the condition may either be precedent or subsequent. In the time of King *H.6.* one named *A.* and *B.* his Executors; and if they would not take it upon them, then *C.* and *D.* should be his Executors: and then there *A.* and *B.* refused; and the question was, whether in suite against the debtors of the Testator, *A.* and *B.* should joyne

Vide Cresbroke & Fox Plowd. A. & B. made Exec. but ought not to meddle during the life of A. & good, 32. H.8. Bro. 155. 3. H.6 fo.6.

joyne with *C.* and *D.* as where foure Executors being named, and two refuſe, and the other two prove the Will, yet all foure muſt be named in ſuits againſt the Teſtators debtors, as was there admited. But in the principall caſe it was reſolved that the ſuite ſhould be onely in the name of *C.* and *D.* for that the appointing of them to be Executors, if *A.* and *B.* refuſed, did imply, that then they only ſhould be Executors. And here all foure were never made, nor intended to be Executors, but *A.* and *B.* upon a condition ſubſequent that they ſhould not refuſe: and *C.* and *D.* upon a condition precedent, *viz.* if *A.* and *B.* did refuſe. It is uſuall to make one or more Executors, conditionally, that they put in ſecurity to pay Legacies, or in generall to performe the Will; nor was it ever doubted, as I thinke, but that this was good: yet I ſhould adviſe, that ſuch condition be plainely thus expreſſed, *viz.* either thus; that if *I. S.* do put in ſecurity, &c. by ſuch a day, that then he ſhall be Executor, elſe not: or thus, *viz.* to make him Executor conditionally; that before he doe Adminiſter (Funerall perhaps excepted) he ſhall put in ſuch ſecurity; elſe perhaps he being Executor till the Condition broken, in that meane time may have diſpoſed of all, or moſt part of the Teſtators eſtate. In the late Queenes time, there was a Caſe remarkeable to this purpoſe: One Willed that if his wife ſuffered *I. S.* to enjoy Blackeacre (being belike part of her Joynture) for three yeares, then ſhe ſhould be his Executor, or elſe *A. B.* ſhould; and the queſtion was in the Common Plees, whether preſently before the end of the three yeares, ſhe were Executor, or not till ſhe

P. 33. Eli. Alice Franceis her caſe

ſhee ſuffered the Land to be enjoyed three years: and it was held by all the Judges, but the Lord *Anderſon*, that ſhe was preſently Executor, untill ſhe ſhould diſturbe *I. S.* &c. for upon that done; it was agreed, that the Executorſhip, would, by vertue of the Condition, be transferred from the wife to *A. B.* But now during theſe three yeares might ſhe have diſpoſed of all the goods of her husband; yea, within one of theſe three yeares, and leſſe time, and then have broken the Condition, and have left to *A. B.* a dry Executorſhip.

19. *H.* 8. 3. 19. *H.* 8. *Dyer.* 4. *Hill.* 33. *El. in Com. b.*

Now to the third Point, one may divide his Executors power three wayes, *viz.* Really, Locally, or Temporally: Really thus. He may make *A.* his Executor for his plate and houſhold ſtuffe: *B.* for his ſheepe, and cattle, *C.* for his Leaſes and ſtates by extent, *D.* for his debts due to him, and ſo divide the power and Adminiſtration of his Executors at his pleaſure. He may divide them alſo, or their power Locally, *viz. A.* for his goods in *Com. Buck.* *B.* for thoſe in *Com. Oxon.* and *C.* for thoſe in *Com. Berk.* He may alſo divide them in time; *viz.* his wife, or any other perſon to be Executor during her life, or during the minority of his ſonne, or ſo long as ſhe continues widow, and after his ſonne to be Executor. So of like limitations, or diviſions, either for time, place, or things, wherewith they ſhall intermeddle. Nay, doubtleſſe one may be made Executor for one particular thing onely, as touching ſuch a Statute, or Bond, and no more; and thereof good uſe may be made, as I thinke, thus. Many have Bonds, Statutes, and Recognizances, for warranty or enjoying of Land, or freeing, or ſaving harmeleſſe from incum-

32. *H.* 8. *Bro.* 115.

cumbrances in generall or particular: Now he which hath theſe, ſelling the Land, may by Letter of Attorney lawfully aſſigne them to the party who buyeth the Land or Leaſe; but this notwithſtanding, the intereſt remaines in him who ſelleth, and by his Outlawry, they may be forfeited or by him releaſed, any Bond to the contrary notwithſtanding; and if he dye, the intereſt in Law will be in, and goe to his Executors, and in their names; onely Suite or Execution may be had and maintained.

Now then, if the Vendor, beſides aſſignement make as to this Statute, Recognizance, or Obligation, onely the Vendee Executor; By this, the intereſt, after death of the party, will be in him actually and really to his more ſafety, ſince none but he can releaſe or diſcharge, nor any other name need to be uſed to ſue, or take benefit thereof. But *Queſt.* If the Vendee, his Heires and Aſſignes may be made Executors, ſo as that ſecurity, ſhall goe to them one after another without renewed, making of Executors. Thus if the party make no other Executor, he dyeth Inteſtate, as to the reſt of his eſtate, and as to this ſpecialty onely, ſhall have an Executor, and muſt have a Will proved: and in caſe he doe make another Will for his ſtate reſidue; there muſt be two Wills proved. But in the other caſe, where by one onely Will, one is Executor for one part of the eſtate, and another for another; there being but one Will to be proved, one proving of it ſufficeth. And though in the premiſes of a Will two be made Executors joyntly, and equally; yet there may be a *Proviſo*, that one ſhall not meddle during the others life, ſo as they ſhall be Executors ſucceſſively

Qua. If not *Aſſets* in Law, when obtained.

32. *H.* 8. *Bro Exec.* 155.

ceſſively, and not joyntly; and thus alſo to other purpoſes aforeſaid, a ſubſequent cauſe or *Proviſo*, may make the partition and diviſion of authority. But if the *Proviſo* or clauſe ſubſequent, be meerely contrary to the Premiſſes; it will be void; as where two were made Executors, with a *Proviſo*, or cauſe, that one of them ſhould not Adminiſter his goods. This was held voyd for repugnancy by *Brudnell* and *Englefield* Juſtices. But *Fitzherbert* Juſtice was of mind that it was not voyd, nor utterly repugnant. For the other might joyne in ſuites, though not Adminiſter; and Juſtice *Shelley* was of a third opinion different from all the reſt, *viz.* that here was a repugnancy; but the laſt clauſe ſhould controll the Premiſſes, and ſo this one onely ſhould be Executor.

19. H. 8. Dy 3. 4.

Who may make an Executor.

SOme perſons may be unable to make Wills, and conſequently Executors; for that is all one: whoſoever may make a Will, may make an Executor, and he that may make an Executor may make a Will. There be nintteene ſeverall kinds of perſons unable, as the *Canoniſts* ſay, to make Wills, but with many of them we will not intermeddle, becauſe we finde no mention of them in our Law. The perſons principally, and moſt uſefully to be conſidered of by us, are either the defective in underſtanding, as Infants, Idiots, Lunatickes, and the like, or defective in power or intereſt, as women covert or marryed; perſons out-lawed, attainted, convict, or excommunicate. Some touch we will give of others, as Aliens, Corporations, Villens, Monkes and

and Fryers. As for Infants and women covert, becauſe much is to be ſaid of each of them and their Adminiſtrations, we will forbeare to treate of them in this place; but after will doe it of each ſeverally.

To begin with an Idiot; naturally he is not able to make a Will, as was reſolved in the Spiritual Court, becauſe he wants the uſe of Reaſon to conceive what is fit for him to Will; nor doth the Common Law oppoſe this as I thinke. 3. *Eli. Dy.* 203. 204.

A Lunatick having *Lucida intervalla*, that is, ſome ſeaſons of enjoying his right minde and freedome from his Lunacy, may in thoſe times of his right mind make a Will, and Executors, elſe not, for even one by age or ſickneſſe become of *non ſanæ memoriæ*, is unable to diſpoſe of Lands or Goods.

One deafe and dumb borne may make a Grant, ſaith Mr. *Perk.* if he have underſtanding, which is hard, as he confeſſeth, conſequently much more a Will: but in the time of King *H.* 8. it is left a demurrer, whether a Deed by ſuch, be good or not. If but mute, he may wage his Law, and attorne by ſignes, and ſo perhaps by ſignes declare his Will. 44. *Aſſ. p.* 36. *Vide plus la Perk.* 5. 6. 33. *H.* 8. *Dy* 55. 56. *Vide* 26. *Ed.* 3. 63. *lib. Intr.* 396. 18. *Ed.* 3. 53. 26. *Ed.* 3. 63. So in effect. 44. *Aſſ. p.* 36. *P.* 31. *Eli. Paſcatia de Fountaines* Caſe.

An Alien may make, or be an Executor, ſo as he be not an Alien enemy, for ſuch cannot ſue; as in the late Queenes time was held; but there the doubt was, whether a ſubject of *Spaine* were at that time to be held an enemy, no warre being proclaimed betweene the Kingdomes, though hoſtility exerciſed.

As for perſons Attainted, Convicted, or Outlawed, it will be ſaid, that theſe can have no goods of their owne, and conſequently, they can make no Wills nor Executors; and it is not

to

to be denyed, that we find it pleaded ſometimes by Executors, that their Teſtators ſtood Out-lawed. But firſt it is cleare, that all and every of theſe may have goods as Executors to others, which neither are forfeited by Attainder or out-lawry, nor deveſted by marriage or Villenage. Therfore as touching them, they may make Teſtaments. And that all theſe ſorts of perſons may be Executors, is alſo evident. So alſo touching Villens, Monkes and Fryers, who can have no goods to their owne uſes. And that one attainted of felony, may have an Executor, appeares by the Caſe in the late Queens time, wherein it was long debated, whether ſuch an Executor might maintaine a writ of Error, or not to reverſe the attainder of the Teſtator: And as for other Out-lawries, the Plea thereof by the Executors, that their Teſtator was, and dyed Out-lawed, proves not a nullity of the Will, or Executorſhip: for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did, or could come to them for ſatisfaction of the debts by reaſon of out-lawry; yet it hath bin delivered, not of old only in many Books, but by ſome of late, that debts upon contract, where the defendant may wage his Law, are not forfeit by out-lawry, nor uncertaine damages for treſpaſſe in battery, or falſe impriſonment, &c. *Quæ.* Of breach of Covenant. But goods taken away by a treſpaſſer, may yet be forfeited by the attainder or out-lawry of him from whō they were taken, for that the property in right ſtil appertained to him, and he might have taken them againe, whereſoever he found them, therefore the action for this ſhall not come to his Executor, but for the other, not forfeited, it may.

33. *Eli. in Bareg.*

39. *Aſſ. p.* 63. 49. *Ed.* 3. 5. 50. *Aſſ. p.* 15. 33. *H.* 6. 27 9. *Eliz. D.* 262. *Contra Co. lib.* 4. *fol.* 95. 19. *H.* 6 47. 30. *Ed.* 3. 4. 16. *Ed.* 4. 7. 5. *Ed.* 3. 53. 6. *H.* 7.

for

Whether an Excommunicated perſon be able to make a Will or nor, may be ſome doubt, ſince *Keble* denyeth him ability to preſent to a Church, and in the very Point antiently, the opinion of *Canoniſts* hath beene Negative, but more lately grew Affirmative. 15.*H.7.f.7* *Summ.Silv tit. Teſtam.*

Who may be Executors, more. 42.*E.* 31.

AN Excommunicate perſon cannot Sue, that is, proceed in Sute as Executor till he be abſolved, there being danger of Excommunication to all that converſe with him; but this makes not a nullity of his Executorſhip, nor overthrowes the Sute, but ſtayes it onely from proceeding untill abſolution. As for perſons attainted or outlawed; we have before ſpoken Affirmatively in way of proofe, that they may make Executors for continuation of the Executorſhip: So of Aliens and others before. Recuſants convicted at the time of the death of any Teſtator are diſabled to be his Executors. 21.*H.6.30.* A Clarke attaint may be an Executor by Paſt. Juſt. *Paſcatio de Fountaine.* But an Alien enemy cannot ſue as Executor *P.31.El.3. Iac.c.5.*

Whether Corporations, Compound, or conſiſting of divers perſons may be made Executors or nor; I doubt. Firſt, becauſe they cannot be Feoffees in truſt to others uſe; ſecondly, they are a body framed for a ſpeciall purpoſe; thirdly they cannot come to prove a Will, or at leaſt to take an oath as others doe.

What a man may give or diſpoſe by his Will.

HAving conſidered of the makers of Executors by Will, and of them ſo made: Let us now

 conſi-

consider what by this Will may be disposed, given, or bequeathed. And first, he, who himselfe is an Executor, cannot by his Will give or bequeath to any other the goods, chattells, or credits, he hath as Executor, the property not being altered, for that he hath not them properly as his owne, or to his owne use: onely he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches, in the late Queenes time. And if he be Administrator, the bequest is then also void, nor then will they goe to his Executor, but to a new Administrator; but on his death-bed he may give them by Word or Deed, though not by Will. Next if a man have debts owing to him, as many have much, it is considerable, whether by way of bequest in his Will, he can give away these to any from his Executors. And doubtlesse he cannot effectually in Law, they being not subject to assignement unto any except the King. So as, if he give such a debt to *A.* and such to *B.* yet must the sute for them be in the name of the Executor, and so also the Release or Acquittance for them, and not in their names to whom the bequest is. But when they be received, if there be no debts to pay, the Executor ought to deliver them to the party, to whom the bequest is, and therefore may be compelled in Court of Conscience, or in the Spirituall Court. Therefore the Case of the bequeathing money, payable upon a Morgage, is in this manner to be understood to be good, and not otherwise, as I take it. He that is joyntly with any other estated in Lands or goods

Bransby. Verf. Granham. Plow. Com. f. 5. 25

Hill. 20. El.

At anytime in his life he may alter the property.

So 48. *E.* 3. *f.* 14, 15.

Where the bequest was to one of the Executors, it was held that the other Executor might release it.

If sufficient otherwise to pay all one, as if none. 48. *E.* 3. *p.* 24. 15. 11. *Ed.* 3. *Fitz. tit. Cond.* 9.

Where both stated joyntly by one Grant. Differences betweene joynt-tenants & Tenants in Common, holding by severall grants.

can

can give no part by his Will, but all will ſurvive, but by Act in his life he may diſpoſe of his part, and the Aſſignee may diſpoſe of his moiety by Will; yea though it be halfe an Horſe or Oxe, that cannot be divided. So of a Leaſe of Lands, or Tithes, or Grant of goods to two, *habendum*, one moyety to the one, and the other moyety to the other; each may give his moyety by Will. But if one be poſſeſſed, or eſtated for yeares by Leaſe, Wardſhip, or Extent, &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of theſe; but notwithſtanding they will remaine unto his Wife upon his death; but yet his Gift or Grant of them, taking effect in his life time, would binde his Wife, and carry away the intereſt from her. If one be Tenant for the lives of one or more; others, as oft times men take Leaſes for lives of yonger perſons than themſelves, this cannot be by Will diſpoſed of, for that it is no chattell, nor is it within the Statutes of Wills, for that it is no ſtate of inheritance. Therefore let the party looke to convey it in his life time, leſt it go to an Occupant, *viz.* him who firſt ſhall enter: If it be a State in Land, he muſt either make Livery, have a bargaine & ſale inrolled or covenanted to ſtand ſeiſed to the uſe of his wife, or ſome of his blood, or make a Leaſe for yeares, determinable upon thoſe lives: Good it be by bargaine and ſale for yeares, if the thing be in Leaſe, that ſo without Inrolment or Attornement the Rent may paſſe, elſe a bargaine and ſale may be made for a moneth, or ſuch like time; and then a Releaſe or Grant of the reverſion, inſtead of Livery and Seiſin. But if a man have a Leaſe for never ſo many yeares, determinable

Another kind of Tenants in Common.

upon life, or lives; that is, if such or such live so long (which unskilled persons call a Lease for lives) this State may well enough be given, and disposed by Will, because it is but a chattell. If a man seised in Fee, or in Tayle of Land having Corne growing upon it, and by his Will doe give the Corne, and dye before severance; this is a good bequest, because the Corne should have gone to the Executor. So it is also of a Parson touching his Glebe, and a man seised in the right of his wife, or his owne right, but for life. But as for trees growing upon the ground: these can no otherwise be given by Will. then as the Land it selfe upon which they grow, may be given of, which matter, as not pertaining to the Office of Executors, *viz.* How, and in what manner Lands may be given by Will, I intend not to treate in these discourses.

Stat. Merton. cap. 2. viduæ possint Legare tam de dotibus quam de aliis, &c. Qua. If the trees may be devised by the Statute of Wils, without giving the Land it selfe.

Of the Revocation and Countermand of Wils and new Publication.

HAving considered of the making of Wills and Executors: Let us before we come to the *Probat*, consider of Revocation, for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz. Inception*, which is the making, and *Consummation*, which is the death of the Testator or maker of the Will, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therfore of Revocations, and also of new Publications, or *Reaffirmance* of Wils in whole or in part. As therefore a Will may be made by word. So also may a Will made in writing, be by word revoked or disanulled: for since every making

Omne testamentum morte consummatur. See the pleading of it by making a later Will. *lib. Intraf.* 323. *b. & 641. a.*

making of a latter Will is a Countermand, and ſuppreſſion of the former Will; and ſince a Will may be made *Nuncupatively* or by word, and ſo by making a verball Will, one may revoke a written Will; It will thereupon follow that one by word may expreſſe the alteration of his mind thus farre that the Will by him formerly made, ſhall not ſtand, but be revoked and annulled; & this will ſtand and be effectuall, ſo as if he after dye without making any new Will, or new Publication, or Reaffirmance of the former, he dyeth inteſtate or without Will. As a Will may be wholly revoked, ſo alſo in part: Hereabout a good reſolution was in a *Kentiſh* Caſe, where one *Ryete* by his Will in writing did give ſome Gavel-kind Land, to one *Harriſon*, and five dayes before his death, ſaid in the preſence of witneſſes, that this gift ſhould not ſtand, and that he would alter it when he came home, deſiring them to beare witneſſe of his Revocation. Now before he came home he was killed by the ſaid *Harriſon*, who cauſed the Will in writing to be proved, and after he was attainted & hanged for the murther, and his Sonne by the Cuſtome of *Kent*, (*viz.* the Father to the bough, and the Sonne to the plough) entred into the Land: and this manner of Revocation, by word only was held ſufficient, although the Will in writing were not cancelled nor defaced. And the like reſolution for verball Revocations is implyed in the Caſe of *Forſe* and *Hembling*, where it being reſolved that a *Feme* Covert, or married woman, by word Countermanding and Revoking her Will formerly made, when ſhe was a ſole or unmarryed woman: this was not effectuall, nor of force, by reaſon of her Coverture, taking away the freedom

14. *Eliz.* *Dy.* 310. *b.*

M. 28. & 29 *El. Co. lib.* 4. *f.* 60.

of her Will, hereby it is implyed that another who hath freedome of Will, may by word ſufficiently revoke a Will in writing; and ſo was it ſince alſo admitted in the Caſe betweene Sir *Edward Mountague* and *Jeoffryes*, touching the Will of Sir *Iohn Jeoffryes*, but there a difference was conceived betwixt ſaying, I will revoke my Will, which onely expreſſed a purpoſe or intent, and therefore was no preſent Revocation; and ſaying, I doe revoke it, or it ſhall not ſtand, or my heire ſhal have my Land, which croſſed the gift of it by the Will. And as Wills may be wholly or in part revoked, ſo may alſo the Executorſhip of one or more of the Executors, and yet the Will may ſtand in all the other parts, ſo as there be any one Executor or more unrevoked; but if all be revoked, then the whole Will is revoked, becauſe no Will can ſtand without Executors: and this Revocation may be by word only, without being expreſſed in the Will or any other writing. But I would wiſh all to expreſſe ſuch Revocation in the foote of the Will, or that the name or names of the Executor or Executors ſo revoked be expunged or blotted out of the Will, and that this be done in the preſence of ſome witneſſes, to teſtifie the act and intent of the Teſtator.

7. H. 6. fol. 3, M. 38. 39. Eliz.

Againe, Revocations may be by act in Law as well as in fact, or by direct and expreſſe termes, as in the ſaid Caſe of *Mountague* and *Jeoffryes*, where Land being deviſed by Will, and the Deviſor after making a ſeoffement, though there were ſome defect in the Livery, to make it effectuall, or if he made a bargaine and ſale, that was never inrolled, or granted the reverſion, but no attornement had, ſo as the Land paſſed not, yet

Vide 6. F. 6. Dy. 74. & 3. & 47. & Mo. 43, 4.

in

in all theſe Caſes the Will or gift of Land ſtood revoked: But in caſe he had onely Covenanted that he would have made ſuch an eſtate, and not done it, this was held to be no Revocation. And ſo by ſome, in caſe he doe but make a Leaſe, leaving the Fee ſimple, as it was, but of this *Quære*; And if a difference may not be betwixt making a Leaſe for yeares, and a Leaſe for life, which altereth the Freehold. If a Leaſe for twenty yeares be bequeathed to *I S.* and after the Teſtator maketh a Leaſe for fifteene yeares, reſerving a Rent, I take this to be no Revocation of the bequeſt; but if the Teſtator after this Will made, take a new Leaſe for a longer terme, ſo as the former Leaſe is ſurrendred in fact or in Law, this muſt needes be a Revocation of the bequeſt, or at leaſt an adnullation thereof, and that although the bequeſt were generally of his Leaſe, not mentioning the number of yeares; for this which he now hath, is another Leaſe, and not that which he had at the time of the making of the Will. So, if one give his blacke Gelding by Will, and after, before his death, he ſelleth or giveth away that Horſe, and buyeth another blacke one, this new gotten Horſe ſhall not paſſe by the Will, becauſe it was not the Teſtators, at the time of making his Will. So alſo, if the Crop in the Barne be bequeathed in *October*, and the party lives till that time twelve moneth, having ſold that Crop and Inned a new, this latter Crop ſhall not paſſe by the Will, and the former cannot.

Againe, as Revocation may be by alteration of the State of the Deviſor, in the Land Deviſed; ſo may it alſo be by alteration, in ſome caſe of the ſtate or quality of the perſon of the Deviſor. As if a woman ſole make a Will, and after take a

Husband, this without any more, as is resolved in the same case of *Forse* and *Hembling*, doth worke a Revocation, or adnullation of the Will, for that else it should be irrevocable, since she having lost the freedome of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked, yet in case her Husband before or after marriage, with her were bound or Covenanted, to performe this womans will, if he so doe not, by payment of the legacies therein bequeathed, his Bond or Covenant stand good, and be sutable against him, as was adjudged touching the Will of *Elizabeth Smaleman*, marryed after her Will made to one *Wood*, who first was bound to performe it: yet another case there is of Alteration in the state of the Testators person, which makes no Revocation of his Will. As if he being of sound minde and ability, make a Will, and after becommeth franticke. In this case this is no Revocation. So as his Will stands till his death irrevocable, if he recover not. Now of a Will Revoked, there may be a reviver by a new Publication, and thereof now.

M. 25. 26, *Eliz.*

Of new Publications.

HAving shewed how a Will may be revoked, and so lose its force; let us now see how without making a new Will, that so revoked may be revived, and set on foote againe. And that is divers wayes: as, First, by a *Codicill* annexed after thereunto, as was resolved between *Betford*, and *Barnecot*, in the Kings Bench. Secondly, by adding any thing to the Will, or making a new Executor, &c. Thirdly, by expresse speech or word, that

M. 38, 39. *El. in ba. reg*

that it ſhould ſtand or be his Will; as I conceive, to have beene the better opinion, in the ſaid caſe of *Mountague* and *Ieoffryes*, wherein yet was much difference of opinion, both touching Revocation and new Publication. If a man having made a former Will, doe make a latter, which is more than a bare Revocation; yet if afterward lying upon his death-bed, and ſpeechleſſe, both theſe Wills be delivered into his hand, and he required to deliver to one of his friends about him, that Will which he would have to ſtand, and to keepe in his hands the other; he thereupon delivereth to the Miniſter or other his neighbours, the firſt made Will, retaining in his hands the latter, as was done in the time of *Edward* the third; Here the former Will, though made voyd many yeares before, by the latter, is revived, and ſhall ſtand as the Parties Will. But now put the caſe that a Bequeſt at the firſt is voyd, yet by Publication after, it may be made good, as if one give to *Sar.* his wife, a peece of Plate or other thing, and hath no ſuch wife at the time, but after maryeth one of that name, and then publiſheth his Will againe; now this ſhall be a good Bequeſt. So if one Deviſe lands or goods, which one hath not; If he after doe purchaſe the ſame, and then ſay that his Will before made ſhall ſtand, or be his Will, it ſhall be a good Will and Bequeſt, for this is in effect a new making. And though moſt of the precedent caſes, be of Revocation of particular parts of the Wil, and not of the totall: Yet firſt, be it conſidered, that that part ſo revoked was in effect the ſubſtance of the Wils Next it is eaſily diſcerned that if one part be revocable ſo is another alſo; And thus Revocation may ſpread it ſelfe over the whole; nay, doubtleſſe the

44. Aſſ. p. 364.

44. Ed. 3. fol. 33.

3. & 4. P. M Dy. 143.

the whole, *Uno flatu*, may be revoked, as well as by parts, even as a tagot may be put wholly into the fire, as well as stick by stick. And as the *Vellities* or disposing parts of the Will, are revocable and revivable by new Publication as aforesaid, so is also the constitution of Executors. As if one of the Executors names be stricken out, and afterwards a *stet* be written over his head by the Testator, or by his appointment, now is he a revived Executor. So if the Testator expresse by Word, in the presence of witnesses that the party put out shall yet be Executor; but now I meane, where the Executors name is not so blotted out, but that it may be read and discerned; for else the *stet* is upon nothing, and if the Verball reaffirmance should renue his Executorship, then must the Will be partly in writing, and partly *Nuncupative*, his name not being to be found in the written Will.

CHAP. II.

Of the State of things instantly upon the Testators Death, before any Will proved.

Here we will consider these severall things.

1. *What is wrought by a gift of a thing certaine and knowne, as the white Horse, the Red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a Release in the Will, to a Debtor.*

4. *what*

4. What by making a Debtor, or Creditor, an Executor.

AS touching the first, *viz.* the Bequest of a chattel reall, or personall, which the Testator had in possession, notwithstanding that, if the said Testator had by his Deede or writing, or but by word in his death-bed, or before, given these his goods, and dyed before they had beene taken, he to whom they so were given, might have taken them; yet in this case of gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them, or recover them from the Executor, or a stranger taking them; by any Suite at the Law, for that he hath no property in them; yea if the bequest be to himselfe, who is made Executor, be it of Lease, Plate, Cattell, &c. They shall not vest nor settle in him as Legate, but as Executor, untill expresse, or implyed election, but made to have and take the same by way of Legacy. And the reason in both cases is this, *viz.* That the Law preferres debts, and the satisfaction of them before Legacies: and tyes Executors also to that rule, and therefore will transferre nothing from or out of the Executor, till he having considered of the State of the debts to be paid, and goods out of which the same are to be paid, shall find that safely this or that Legacy may take effect, without making any defect in payment of debts, or drawing upon him and his own goods any damage or losse as a waster: and thereupon shall assent to such Legacy. Thus now is the Law taken; but heretofore some opinion hath run otherwise, *viz.* That he to whom any Bequest was made of a thing knowne and certaine,

1 & 2. P. & Ma. Dy. 110. a. & 139. b. vide Co. 8. f. 95, & 96. Of the second. See Co. 10. f. 47. 652. So resolved pas. Trin. 37 Eli. in b. a. M. onely Gaw. contr. Portman. pl. & Simes deft. See more of this Tit. Legacy: & of the assent of one Executor onely.

27. H. 6. 8.

taine, might take it without any assent of the Executor: and that when to the Executor himselfe any good or Chattell moveable or immoveable was bequeathed: In case there were otherwise sufficient goods, for satisfaction of debts, the same should instantly upon the Testators death, without any act or election, by the Executor be transferred into, and unto him in his owne right, as a Legacy: and not remaine in him as Executor. As for summes of money bequeathed, or so much in Plate, or Rings, it is evident that they must be had by the delivery of the Executor: Yet hath the Legate such an interest before delivery, as that dying before payment it will goe to his Executors. But as I take it, no such to whom any thing certaine is given by Will, can make any gift or grant of it, before the Executor have assented to his having thereof; Nor perhaps will the Executors assent, after the grant have such relation, as to make good the grant precedent; why so yet? more than an attornement of a Lessee, which is alike assent to the grant of another? And *Quære* if by the out-lawry of the Legatee, before the Executors assent, this thing bequeathed be forfeited.

Of late perhaps some single or suddaine opinions may also have runne that way, but in *Portmans* case the point was divers times argued, & then adjudged as before. To be bought. *Que.* of this see more after *Tit.* Legacy, thereabout

If without just cause an Executor will refuse to assent, he is compellable by Law Spirituall, or Court of Conscience, yet if Spirituall Court presse to do where is just cause to stay, a *prohibit.* lyeth, *ut Credo*; for since Executors stand lyable to recovery of debts against them by Common Law, it is reason that Law enable them to keepe wherewith to pay. And here yet note some seeming opposition in Law; for where before great difference was shewed betweene a Devise or Bequest, and a gift or alienation executed in ones life

life time? Yet the Lord *Dyar* reports it to be resolved, that where a Lease for yeares was made upon condition that the Lessee should not Aliene in his life time, that yet a Bequest of his Lease by his Will, was a breach of the condition, as being an alienation in his life time.

3. Of a discharge by Will to a debtor some question may be whether to perfect and make good this, so as the debtor may plead it in Bar, there be not requisite, as in the former, an assent of the Executor. On the one side, since this giving is a forgiving, for he to whom it is bequeathed, cannot otherwise have it, then by way of retainer, it may probably be said, that here needs no such assent of the Executors, as in the case where any thing is to be transferred; for here is rather an extinguishment, and an exoneration then a passage of a Chattell by way of *Donation:* On the other side it is probable that it being but a Bequest, and so a Legacy, since debts are in Law and Conscience, to be satisfyed before any Legacyes, that therefore the Executor having not sufficient otherwise to satisfy his Testators debts, may sue for this debt, and refuse to suffer it to passe away as a Legacy. And to this opinion doe I encline, as best for Creditors; and satisfaction of debts is by Law respected as an act greatly concerning the Testators soule. But some will perhaps make a contrary doubt, that although there be an assent of the Executors to this discharge, yet it will not amount to a legall release, for that a debt, at least, if it be by specialty, cannot be released but by Deed, and a Will is no Deed, for a Seale is not necessary thereunto, though it be fit and convenient; whereto I give this answer, that a Will though it be not properly and legally a Deed

Not *de esse*, but *de bene esse*.

Deed, for it may be good enough without a Seale, which is an essentiall part of a Deed, yet hath it the force and effect of a Deed; for as a Release cannot be made but by Deed, so neither can an Estate or Interest though but for yeares in Tithes, Advowsons, Commons, Faires, and like things be granted or assigned otherwise than by Deed, yet it is cleare, that such a state for yeares in any of these may be given by Will, as well as a Lease of Land, which proves a Will to have the force and effect of a Deed.

Of making a Debtor or Creditor, Executor; and first of the Debtor made Executor.

SUppose we then that *A.* and *B.* being made Executors, the Testator was indebted to *A.* twenty pounds, and *B.* was indebted to the Testator twenty pounds, how doe things stand presently upon death. First, it is cleere that the debt of *B.* to the Testator stands in Law extinct, this making of him Executor, being a release in Law. Therefore let Debtees, take heed of making their Debtors Executors: And yet doubtlesse me thinkes such a Debtor made Executor should hold himselfe restrained in Conscience, from taking benefit thereof, if (the debt remitted) there shall want to satisfie either debt or Legacy of the Testator: and I doubt whether a Court of Conscience may not justly so order; the Testator, being perhaps ignorant of this point in Law, that this debt should be released by making the Debtor Executor. And what is spoken of making the Debtor Executor, generally the same is to be understood of making any one of the Debtors Exe-

21. *H.* 7. 31. *Plow. Com.* 185. *cont. Danby & Choke.* 8. *E.* 4. 3. And may be granted that he should account before the Ordinary for it. Yea it seems *Plow.* 186. *a.* the Law was taken to be as *supra.* 8. *E.* 4. Though he never administer. 21. *E.* 4. 3. 81. 11. *H.* 6. 38. 2. *R.* 3. 20. *per Starkey & 22. per Vavasor.*

cutor, where there be many joynt debtors: and ſo alſo where many Executors be made, and but one of them is Debtor to the Teſtator, for they cannot ſue without making him who is the debtor, alſo a plaintiffe, which he cannot doe againſt himſelfe. The like Law touching Actions of treſpaſſe or account: Yet of old, where one made his Bayley one of his Executors, together with *A.* and *B.* who brought an Action of Account againſt the Bayley, in their two names onely; Juſtice *Herle* held the Action well brought: This was in the beginning of King *Edward* the third his time; but the contrary hath beene ſince reſolved: ſome alſo have held, that though in the life of this Executor, who was a debtor, he could not be ſued, yet after his death, the ſurviving Executors might ſue his Executor: but that cannot be, as I take it, for that the debt was utterly extinct, by the making of him Executor; as if the Teſtator had releaſed it to him, yea, though this Executor dyed before he did ever Adminiſter or prove the Will. And like extinguiſhment of the debt, if the Creditor marry with one of the Executors of the Debtor, yet was there an Action of debt maintained *temp.* *Edward* 3. By the Huſband and Wife, againſt the Huſband, and other Executors upon an Obligation by the Teſtator to the Wife, before her marriage. But if a debtor take Adminiſtration of the goods of his Creditor, this me thinkes ſhould not diſcharge him, but that his debt ſhould ſtand as Aſſets in his hand, becauſe the inteſtate did no act to free him from the debt.

9. H. 5. 13. Left a demurrer in treſpaſſe by all, againſt the Executor, who was treſpaſſor.

3. E. 3. 23, 6. H. 4. 3. 8. E. 4. 3. Choke. 21. H. 7. 31. 20. E. 4. 3. 61. Plowd. com. 36.

Plowd. com. 185. 11. H. 4. f. 83. 84.

31. E. 3. Fitz. Ex. 82.

The

The Debtor or Creditor made Executor.

THis making of the Debtee Executor, and ſo the party who both ſhould pay and be payed the debt giveth him clearely power to pay himſelfe before any other, if his debt be by Specialty or upon Record. Nay, ſome have held that ſo much of the goods of the Teſtator, ſhall be altered in property out of the Executor, as Executor, into him as Creditor, but how that can be I cannot ſee: For whether ſhall it be ſatisfyed out of the Leaſe and Chattells reall, or perſonall, whether out of the Corne in the Barnes, Cattell in the Fields, Plate or Houſholdſtuffe: this till ſome election made by this Debtee Executor, cannot be knowne, nor ſhall be effected by any operation of Law, preventing the Executors election, in taking his ſatisfaction, where and how he will. For certainly, as an Executor hath election to pay which Creditor he will firſt, ſo hath he election to pay, & ſatisfy himſelf, by what part of the Teſtators goods he will, yet perhaps if there be ready money in the Executors hands, there ſhall be an alteration of the property of ſo much therof as was owing by the teſtator to the executor: & if there come not to the hands of ſuch executor ſufficient to pay himſelfe, he may have an Action of debt againſt the other Executor, or the Heire, as by ſome hath bin conceived: yet let it be wel adviſed of, whether, if he do adminiſter at al, and ſpecially, if he pay himſelfe any part, he have not thereby barred or diſabled his Suite for the Reſidue. But if he refuſe to Adminiſter at all, it were very unreaſonable that he ſhould not be able to ſue the other Executors, for ſo a Debtor might by ſubtilty make his Creditor an Executor with others, and take a courſe that his goods ſhould

Plow. com. 185. By all the Judges, but *Brooke* Cheefe Juſtice. *Plowd.* 185. *b.*

Where the goods be of more value, which ſhall be ſo altered?

See *Plowd. com.* 544. the like of a Legacy of twenty pound given to the Executor.

Or if the goods amount in all to no more than this debt.

See *Plowd. com.* 185. 13 *H.* 8. 15. 11 *H.* 4. 83. 12 *H.* 4. 21. 20 *E.* 4. 17. 21. *E.* 4. 3. *Plow.* 184. *b.* & 185. *b.*

He is barred for he cannot apportion his debt.

ſhould come only into the hands of thoſe others, ſo as the Debtor could not pay himſelfe; and conſequently, if he could not ſue the other Executors, he ſhould thus be ſtripped of his debt by a ſleight. *Quære*, if he may bring the action in the name of the other Executors, onely the Will being proved in his name, as well as in the names of the reſt, or whether the Action ſhal be brought in his name alſo, and then he be ſevered at his owne prayer. But againſt the Heire there is none to joyne with him, and him may he ſue, if he have not Adminiſtred as Executor; this admitted, that the Bond extend to the Heire, which without expreſſe words it doth not, though for the Executor it be otherwiſe.

1 2. *H*, 4. 21 He may ſue the Heire if the Heire bound, and he have not ſufficient goods as Executor

Thus having conſidered of the ſtate of things before and without any Will proved, or other act done by Executors: we ſhould now come to the point of proofe, but two things pertinent to it, are in Order precedent.

CHAP. III.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of refuſall, and the things incident thereunto.*

Before probate, what may be done by or to Executors.

AS to this it is cleare, that before proving of a Will by the Executor, he may ſeiſe and take into his hands any of the goods of the Teſtator, yea

enter into the house of the Heire, if not locked, so to doe, and to take the specialties of debts, and generally he may doe all things, which to the Office of an Executor pertaineth (except onely bringing of Actions and Prosecution of Suites.) He may pay debts, receive debts, make acquittances and Releases of debts due to the Testator, and take Leases or acquittances of debts owing by the Testator. Yea, if before such proving the day incur e for payment, upon bond made by or to the Testator, payment must be made, to or by this Executor, though no Will be proved, upon like paine of forfeiture, as if the Will were proved Also an Executor may before *Probate*, sell or give away any of the goods or Chattells of the Testator. And whereas the assent of an Executor, is necessary to the setling and Execution of a Legacy, as before hath beene shewed. So as if one give me his white Horse, or blacke Cow, by Will, or any other well knowne thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespasse, at the Executors suite, if he doe not assent; yet an Executor before the Will proved, may give this assent, and it will stand good. Yea, although he dye after any of these acts done, the Will being never proved by him, yet doe these Acts so done, stand firme and good, as I take it. Yet (as I find) an Executor making his Will, and dying before he had proved the Will of his Testator: his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testators goods, with the Will annexed, as by Doctor *Drurie*, was in the

9. E. 4. f. 33 47. 7. H. 4. 18. They cannot sue till they have the Will under the seale of the Ordinary.

Wray. 23. El

22. & 23. El. Dy. 372

late

late Queenes time declared to be the Law and course of the Court Spiritual, to which credit was given by the Judges of our Law, and the Court of *Star-chamber*: for though the Book doe not mention it to have been in *Star-chamber*, it is elsewhere so reported: Yea an Executor, for goods of the Testator taken from him or a trespasse done upon the Lease, Land, or a Distrayning, or Impounding of goods or Cattell, may maintaine before the Will be proved, Actions of Trespasse, or *replevin* or *detinue*, for these Actions arise upon the Executors owne possession. But before the proving of a Will, an Executor cannot maintaine a suite or action of debt or the like. And the reason is, for that therein he must shew forth the Will proved, under the seale of the Ordinary. And so, as I take it, must it be, if he bring any Action for trespasse done, or goods taken in the Testators life time, so as the Testator himselfe was intitled to the Action, and it growes not upon the Executors possession. I finde that an Executor granting the next avoydance of a Church, which to him came from the Testator; the Grantee maintained a *Quare impedit*, without shewing forth the Will: But the Executor himselfe might so have done, as of his owne possession before the Will proved, and so without shewing it under the seale of the Spirituall Court, as well as Actions of trespasse, or *Replevin*, for goods taken after the death of the Testator: yea in the Principall case of *Greisbrook* and *Fox*, which was an Action of *Detinue* by the Executor, for goods taken or detained after the Testators death, and the Plaintiffe did shew forth the Will proved. But that proves not any necessity thereof, or that if the Will had not been proved,

Dy. in Plow com. 281. Case of Greisbrooke & Fox.

34. H. & M. Dy. 135. a. Dy. in Plow. com. 281. a.

Plow. com. 275. b.

proved, it could be no hurt to ſhew it forth, ſo upon his owne contract for the Teſtators goods as if the Executor ſell Cattell, or other goods of the Teſtator, before the Will proved, he may for the money payable, maintaine an action of debt, before he have proved any Will: and in this and the action of Treſpaſſe, there is no neceſſity of naming him Executor. Alſo on the other ſide, an Executor may well enough be ſued for debts of the Teſtator, before the Will be proved; for he may not by his owne Act of delaying the *Probate* of the Will, keepe off Suites, except he will refuſe in due manner, that ſo Adminiſtration being granted, there may be ſome body Suable by the Teſtators Creditors, for debts by him owing. And the uſuall plea of the Defendant, to eſtrange himſelfe from the Teſtament, is to ſay that he neither is Executor, nor hath Adminiſtred as Executor. So as if he either be Executor *De jure*, or *De facto*, by his owne act of Adminiſtring it ſufficeth.

Of refuſall to prove the Will, and therein of Adminiſtration, foreſcluding refuſall.

NOw touching this other point, fit to be thought of, before we meddle with the *Probate, viz.* Refuſall to prove, we will thereabout conſider theſe ſeverall parts, *viz.* Firſt, how and in what manner refuſall may, or muſt be. Secondly, in what Caſes, or in reſpect of what acts one named Executor hath loſt or determined his election of refuſall or acceptance. Thirdly, of what effect and operation the refuſall is, what difference, where all the Executors refuſe, and where but ſome or one of them. Fourthly, what relation it hath.

Now

Now touching the first; the Ordinary, before committing Administration where a Wil is made, and Executors named, if he know of it, must send out Proces against the Executors, to come in and prove it, and if they doe not come, they are to be excommunicate; but if they doe come, if they nor any of them will prove, by reason of such refusall, the Ordinary may commit Administration; perhaps also they may be appointed Executors at a time future, & not presently. Now refusall cannot be verbally, or by word, but it must be by some act entred or recorded in the Spirituall Court, and therefore must be done before some Judge Spirituall, and not before Neighbours in the Country; for that is not effectuall. Yet Sir *Ralph Rawlett*, making the Lord Keeper *Bacon*, *Catlin*, Chiefe Justice, and the Master of the Rolles, Executors, they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so: making every of their Refusall, and this was held good: So as a Lease being by that Wil bequeathed to *Catlin*, and he after this refusall entring and assigning it to one, and the Administrator assigning it to another, it came in question betweene them, whether had best right, and Judgement was given for the Assignee of the Administrator, against *Catlins* assignee, whereas, if the refusall had beene voyd, *Catlin* had continued Executor, and so his title had beene better. First, in case the Ordinary himselfe, he made Executor, there saith the Booke, he may refuse before his Commissary, and so was it there pleaded for the Arch-bishop of *Canterburie*, who was made Executor to Sir *William Oldhalle*.

3. H. 7. 14.

9. Ed. 4. 47
3. He. 7. 14
Plow. com. 281.

9. Ed. 4. 33. see Plow. 184. a. If Debtee made Executor, sue the Ordinary for the debt; this amounts to a refusall of the Executorship.

M. 28 & 29. El. Inter Brooke & Carter. in ba. com.

9. Ed. 4. 33. The Book calls him Cardinall of Canterbury.

What shall be such a medling or Administring by an Executor that he cannot refuse after.

As to the second, where an Executor hath Administred, he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such refusall, but should compell him to take upon him the Executorship, as the Law was taken both in the time of *Ed.4.* and of Queene *Elizabeth*: Yet if the Ordinary doe admit one to refuse, notwithstanding that he have Administred; this standeth good, as it seemeth, conceived by the Judges in the time of *Hen.6.* for there the Executor commanded one to take goods of the Testator, out of the hands of *I. S.* who did accordingly; and afterward the Executor refused before the Ordinary, and Administration was committed to the said *I.S.* who brought an action of trespasse against the party so taking the goods from him, and there the refusall and committing Administration were admitted to be good: so perhaps *Factum valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executors such intermedling at the time when he did admit of his refusall. After Refusall and Administration committed, the Executor cannot goe backe to prove the Will, and assume the Executorship: but if onely upon the Executors making default to come in upon Processe, to prove the Will, the Administration be committed, here the Executor may yet at any time after come and prove the Will, and so undoe the Administration: as was in the late Queenes time resol-

9. *Ed.* 4. 47 selling land as Executor is Admin. *Dyer* in Case of *Greisbrooke & Fane. Plow. com.* 280. *b. Pas.* 7. *Eliz.* 36. *Hen.* 6. *f.* 7. 8.

Mich. 27. 28. *Eliz.*

resolved, betweene *Bale* and *Baxter*.

But what if after refusall, it shall appeare to the Ordinary, that the Executor had administred before his refusall, so as had it been then known the Ordinary should not have admitted him to refuse; Whether now may he revoke his Administration (for it is revokeable) and inforce the Executor to proceed to proving of the Will. And surely me thinkes he may, for that the Executor by Administring, had determined his election, and accepted the office of Executorship; now he cannot both except and refuse. Besides, we know that Creditors may maintaine their Suites against him, having once Administred, the Common Plea to free himselfe, and shew that he is not the party suable for the Testators debt, being that he neither is Executor, nor ever did Administer as Executor, wherefore he having administred, it will be found against him. Now it is not congruous, that in the Spirituall Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this Point of Administring is so materiall to the Point of being admitted, or not admitted to refuse; we will here consider in this place, briefly, what shall be said to be an Administration by an Executor, determining his election, and disabling his refusall, and what not. 1. Some will perhaps conceive, that the act of the Executor in the fore-mentioned Case, where he onely commanded *I.S.* to take goods of the Testators out of a strangers hands, was no Administration: and it is true, that in that Booke it is passed in silence, and not expresly said to be an Administration.

Bonus Case. in com. ba. A. being Executor did administer, and yet would not prove the Will. *B.* tooke Administration, and being sued for debt, did pleade the matter *supra*, and held a good plea, & was found for him before Just. *Dodridge ad Or. in a stat. 2. Carol. reg. 36. H. 6. 7.*

But the Lord *Dyer* in the Case of *Greisbrooke*,

and *Fox*, ſpeaking of that Caſe, ſaith expreſly, that the Ordinary might there have rejected the Executors refuſall; for ſaith he, when the Executor had once intermedled, he ſhould not have beene ſuffered to refuſe; ſo as he doth clearely admit that to have beene an Adminiſtration. And elſewhere it is held, that if an Executor take goods of the Teſtator, and convert them to his owne uſe; this is an Adminiſtration; yea, if he doe but take them into his hands, ſay ſome, without converting of them: If the wife take more apparell of her owne than is neceſſary, this is an Adminiſtration, as the Booke admits; but if by the aſſent, or delivery of the Executor, it is not. More clearely, if one doe either pay debts of the Teſtator, or receive debts, or make acquittances for them, or demand the Teſtators debts as Executor; or give away goods which were the Teſtators, or deliver money of the Teſtators for Fees about proving the Will: all theſe be full and cleare Adminiſtrations as Executor. But ſaith *Fitzherb.* if he onely lay out his owne money for Fees, this is no Adminiſtration, ſo ſaith *Frowicke*, if he pay debts with his owne money; and if he doe it about the Funerals. But ſome difference may be betweene Acts done by one named Executor, and by a ſtranger, *viz.* to make him an Executor of his owne wrong, whereof we ſhall ſpeake after, not in this place. If one being ſued as Executor, take it upon him, and plead in Barre as an Executor, this is an Adminiſtration.

30. *Ed.* 4. 19. & 21. *E.* 4. 5. 21. *Ed.* 4. 5. 21. *H.* 6. 19 20. 33. *H.* 6 31. 8. 1. *Eli. Dy.* 266. 13. *Ed.* 3. *Exec.* 91. 3. 4. *Ma. Dy* 235. 16. *H.* 8. 7. 8. 20. *H* 7. *Kelw.* 53. 21. *Ed.* 4. 5 20. *H.* 7. *f.* 5. 9. *Ed.* 4. 12. 13. 33. *H.* 6 31. a.

Of the force and effect of refuſall.

AS to the third Point, *viz.* the force or effect of Refuſall. Firſt, it is cleare, that if there be but one

one Executor, and he doe refuse, or being many, if they doe all refuse, then is the party dead Intestate, and Administration is to be committed with the Will annexed, as is before said; nor can any after meddle as Executors. But in case there be divers Executors, *viz.* *A.B.* and *C.* and *A.* onely refuseth, and the Will is proved by the others, there *A.* continueth an Executor; notwithstanding his refusall, so as he still may release debts of the Testator; and debts owing by the Testator may be released to him; yea if Suite be to be had, by, or against the Executors, it shall not be in the name of *B.* and *C.* onely; but *A.* also must be named as a Plaintiffe, or Defendant, else the Action may be overthrowne. For the Will being proved, all the Executors therein named, stand and continue Executors; notwithstanding any of their refusall, as it was resolved in the latter end of the late Queenes time, according to divers former resolutions. And therefore this Executor which hath refused, may afterwards Administer at his pleasure, and intermeddle with the goods, as well as the others: yet saith *Brooke* Chiefe Justice, after the death of his Companion, he cannot so doe, but then the Executor of him who proved, is onely to Administer, *Quod non est Lex.* There may be some difference betweene Suites by Executors, and Suites against Executors; for when themselves sue, they being privy to the Will, and having the Custody of it, must bring their Action in the name of all the Executors, according to the Will; but he that is to bring an Action against them need not perhaps take notice of more Executors, than those that have proved the Will, or otherwise doe Administer; for it is no good plea for themselves in

Coke. l. 5. f. 28. Com. 18 E. 2. Bro. 837.

22. Ed. 3. 19. 15. Ed. 3. Exec. 8, 41. Ed. 3 f. 22. 21. Ed. 4. fol. 24.

42. El. Co. 9 f. 36. 37.

4 & 5. Ph. & Ma. Dy. 169. a 6. contra. 21. E. 4. 23. 24

an

an Action against them, to say there is another Executor, without saying also that he hath Administred, as it seemeth by divers Bookes. Nay one Booke in the time of *Henry* 8. goeth further, *viz.* that if Suite be brought against all, yet one of them not intermeddling with the proving of the Will, may plead that he was never Executor nor Administred as Executor. By this it should seeme, that Executors refusing (I meane all of them, so as no Will is proved) they in an Action against them, may say, that they were never Executors; but me thinkes they should not so plead, but shew the speciall matter, as was done in the time of *Edward* the fourth.

33. H. 6. 38. 4. Co. 9. 37. 6. 32. Hen. 6. 25. 27. H. 8. 11. p. totum curcam.

9. Ed. 4. 33. Co. 9. f. 36.

As for Relation, I will forbeare to speake, till I come to proving, for that *Probate*, and Refusall stand in the same state, as touching Relation.

Chap. IV.

Of proving Wills.

NOw let us see touching the *Probate* of Wills, what is considerable; and therein of these three or foure parts;

1. *Where and before whom, and how the proofe must be.*
2. *What shall be* Bona notabilia, *to intitle to* Probate.
3. *What force or validity, either a right or erroneous* Probate *hath.*
4. *What relation either Probate or Refusall hath.*

As

As touching the first Point, *viz.* How, and where, and before whom Wills are to be proved, briefly thus;

The proving is in the Spirituall Court: yet in some Manors by Prescription, Wills are to be proved before the Steward, though no Lands thereby passe, as appeares by divers Bookes: and in the Manor of *Mansfield* is this Prescription; and in others, whereof *Tremaile*, was Steward in King *Richard* the third his time as he declared, and the like, I may tell of my owne knowledge, touching the Manors of *Cowly* and *Caversham* in the County of *Oxford*, where I have kept the Courts for the Lord Vicount *Wallingford*, and found it in present and frequent use. And it is said by the Judges, in the time of King *Henry* 7. that this proving of Wills in the Court Spirituall, is not ancient, but of later time. Yea it is acknowledged by *Linwood* the Deane of the Arches, that it pertaines not to the Spirituall Court of Common right; nor is so in use in other kingdomes. The reason why the Law of *England* hath herein given way to the Ordinary, and Court Spirituall, is said by *Walsh* in *Brookes* and *Foxes* Case, to be the piety and integrity which is presumed to be in those of that Function, having charge of soules. Indeed they are, as it seems to me, Executors of the New Testament or last Will and Testament of Jesus Christ; whereby great Legacies and Gifts are given to men, and by Pastors to be dispensed and distributed: of which distributers, it is required, as S. *Paul* saith, *That they be found Faithfull.* And happy are they, who with him can pleade, *Plenè Administravit, viz.* that they have fully Administred, as he did; much depending thereupon,

2. R. 3. *Fit.* 4. *Co. lib.* 9. *fol.* 43.

11. H. 7. 12

Plow. com. 279.

1 Cor. 4. 2. Acts 20. 27

viz.

viz. Gods honour, the blessing, prosperity, and safety of the Country, the Piety, Justice, Conscience, Contentation and Salvation of men. As for Wills proved in *London*, and *Oxford*, before the Major, that is onely in respect of the Burgages within those places devisable, but they were to be proved also before the Ordinaries, in respect of the goods, and there onely, where no Lands bequeathed.

The proving then is to be before the Ordinary, Generall, Particular, or Speciall. By Generall, I meane the *Metropolitane* or Arch-Bishop, before whom it is to be proved; in case the Testator have goods valuable, called *bona Notabilia* in divers Di cesses, whereof he is Superior.

Vide fol. proxim. If *Bona Notab.* both in *Canterbury* and *York.*

Of Bona Notabilia.

WHat shall be said to be *bona notabilia*, is considerable, for there-about hath beene much diversity of opinion: Some holding, that they must be of forty shillings value: some five pound, some ten pound; yea some, that the value of a penny sufficeth to draw it to the Arch-Bishop, from the particular Bishop. But that difference of opinion I conceive to be now cleared, by a Canon made in the first yeare of his Majesties Raigne, at a Convocation then held, whereby it is established, that five pound shall be the sum, or value of *bona Notabilia*; yet therein is this *Proviso*, that where by Composition or Custome in any Dioceses, *bona Notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise thereby provided, that if any man dye in *Itinere*, *viz.* in his journey or travell, the goods which he then hath about him, shall not cause that Administration shall be committed, or the

Canon 92.93

the Will proved before the *Metropolitane*.

Having considered of the value: now another Point observable, is, what things shall be said, to be *bona Notabilia*. And as to that debts owing to the Testator, are *bona Notabilia*, as well as goods in possession, their value being answerable; yet I thinke, if the *Penall* summe of the Bond be but five pound for payment of a lesse summe, although the Bond be forfeited; yet in the Spirituall Court, where respect to Conscience suppresseth the favouring of Executors; this will not be taken to be *bona Notabilia*, *viz.* of five pound value, although in Law, the whole *penall* summe be a duty. But if the debt be five pound or more, though it be desperate or due from the King, against whom no Suite can be, but only by perition: yet will this stand for, and as *Bona Notabilia*, as I take it in the Court Spirituall, though thereabout I can but conjecture since the Rules of our Law determine it not. And this Point touching the Kings being debtor, I finde debated in the late Queenes time, but not resolved, so farre as I finde, but there *Popham* at the barre urged; that no debt should be *Bona Notabilia*; and if it should, yet not such, for which no remedy by Suite, as in that Case, the Queene being debtor. Yet a further Question Locall, is touching these debts, or things in Action, in what place or Diocesse, they shall be said to be, as *Bona Notabilia*, *viz.* whether in the place where the debtors be, or where the Obligation, or other specialties be. And as to this the Law hath beene taken, that because the persons of the debtors be moveable, passant, and transitory; therefore these debts shall be said to be, and to make *bona Notabilia*, where the Bonds

21. Eliz.

Goods considerable or conspicuous.

or

or other Specialties be, and not where the debtors inhabit and dwell: and so was it not long since conceived by Justice *Walmsley*, and Justice *Beaumont* in one *Prettiman's* Case, no other contradicting it. Herein therefore many are mistaken, who onely in respect that the persons of the debtors do dwel in forraine Dioceſſes, other then the places of the death of the Teſtator, or where his other goods were, doe take Adminiſtration in the prerogative Court, though the Specialties remained, where the party dyed, or his goods reſidue, were. But in caſe the debts be onely by Contract without Specialty, then indeed they are to be eſteemed *Bona Notabilia*, there, and in that place, where the debtor is, as the ſaid Judges well conceived the difference. But in caſe Land be given to Executors, for payment of Debts or Legacies, this ſhall not be *Bona Notabilia*, as I take it, though it be Aſſets.

Hil. 39. El. M. Com. Da. Vide 13 & 14. Eliz. Dy. 305.

Of the validity, and invalidity of Probates.

AS to the third Point, we will firſt ſee of what validity an erronious proofe is, and thereabout we ſhall find this difference: admitting that one hath not *Bona Notabilia* in divers Dioceſſes, ſo as of right, the proving of the Will, appertaineth not to the *Metropolitane*, and yet the Will is proved before him; this is not meerely voyd, but ſtands in force, till it be reverſed by ſome ſentence upon appeale, as was reſolved betweene *Yeare* and *Jeoffries*, in the late Queenes time. But on the other ſide, in Caſe one have *Bona Notabilia* in divers Dioceſſes, or a peculiar, and a Dioceſſe, and yet the Will is proved before the particular Biſhop, within whoſe Dioceſſe part of the goods

22. Eliz.

goods are; this is meerely and utterly voyd, without any reverſall. So alſo of proving in ſome peculiar. And in Caſe one have *bona Notabilia*, both in the Dioceſſe of *Canterburie*, and in the Dioceſſe of *Yorke*; the Will muſt be proved either before both *Metropolitanes*, if within each of their juriſdictions, there be *bona Notabilia* in divers Dioceſſes; or elſe, as I take it, if there ſo be not in any of the places, then before the particular Biſhops in thoſe ſeverall Dioceſſes, where the goods are. Or if within the one juriſdiction *Metropolitane*, the Teſtator had goods in divers Dioceſſes; and in th'other, but in one Dioceſſe: then in the one place is the Will to be proved before the Arch-biſhop, and in the other place before the particular Biſhop, as I conceive. And ſo alſo of peculiar juriſdictions. And in ſome places Archdeacons have peculiar, or juriſdiction ordinary, and power to take *Probates* of Wills and grant Adminiſtrations. But where any like error or miſproving is in theſe reſpects, it is cauſe of reverſall or of nullity, according to the former difference; ſo alſo, if there be falſhood in the proofe, were it *Communi forma*, that is, without witneſſes, or by examination of witneſſes, yet may it in the Spirituall Court be undone; if either diſproofe can be made, or proofe of revocation of that Will once made, or of the making of a latter.

Now, yet admitting the Will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the Proof, or Will ſo proved. It being under the Seale of the Ordinary, cannot be denyed, ſaith one Booke, to wit, whether this ſhewed forth, be a Will proved or not, no, though the proofe be but indorſed on the backe,

vid.

viz. that it is ſo proved, ſaith the Booke: but notwithſtanding the Defendant ſo ſued, may deny that the Plaintiffe is Executor, as not being concluded nor eſtopped by the *Probate*, ſo to ſay. And the reaſon is, becauſe the Seale of the Ordinary is but matter in Fact, and not matter of Record; nor are the ſentences of divorce, and the like, in the Spirituall Court, Judgements, or matters of Record; as hath beene often held.

p. Ed. 4. 47.
22. Ed. 4. 50
22. H. 6. 5 a
Plow. com. 282. 44. Ed. 3. 32. 19. Aſſ. p. 2.

Of the Relation of Probate *and* Refuſall.

AS for this laſt Point, both the Proving and the Refuſall ſhall have Relation to the death of the Teſtator, as I take it to divers purpoſes. So as to the Proving, ſaith the Lord *Dyer* expreſly, and confidently in *Greisbrooke* and *Foxes* Caſe, and the reſolution alſo of the Caſe proves it. For there Adminiſtration being committed before any Will proved or notifyed to the Ordinary, as it ſhould ſeeme, the Adminiſtrator ſold ſome of the goods to *I. S.* and after the Executors proving the Will, brought an action of *Detinue*, for thoſe goods againſt *I. S.* who pleaded this Adminiſtration and ſale, and thereupon the Executor demurred, and Judgement was given for him, as having by the proving of the Will, diſproved the Adminiſtration *ab initio*: but it is true, that judgement was given onely by two Judges; one being abſent; and the other diſſenting in opinion; yet I thinke it was right, and according to Law; and that Refuſall ſhall have the like relation; elſe could not the Adminiſtration relate to the death of the Inteſtate, as it doth to ſome purpoſes, expreſſed in divers Bookes, *viz.* to have an Action of Treſpaſſe for goods taken before

Plow. com. 281. a. 283.
18. H. 6. 2 a
29. E. 4. 33
47. Not to make good a Releaſe made before *Ca. lib.* 5. 28.
36. H. 6. 8.
2. Ma. Dy. 110.

fore Administration committed, and to have a rent growing payable in that meane time,&c.

What Fees to be paid upon *Probate*, or for Copyes of Wills, or Inventories.

Per Stat. 21. Hen. 8. Cap. 5.

1. *Where the goods amount not above five pound.* } *onely five pence to the Scribe.*

2. *Where they be above five pound, but under forty pound.* } *two* s. *six* d. *to the* B.B. *twelve* d. *to the Scribe.*

3. *Where above fortie pound to be taken, but---* } *two* s. *six* d *to the* B.B. *two* s. 6. d *to the Scribe; or,* 1. d. *for each ten lines of ten inches long at the Scribes choyce.*

THese Summes are to satisfie, both for Proving, Registring, Sealing, Writing, Prayſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the same.

Where Lands is given to be sold, neither the money raised, nor the profits thereof shall be accounted as any of the Testators goods, or chattells, saith the Statute.

Note, that the Will is to be brought with waxe thereunto ready to be sealed, and proofe to be made of the Will, according to common Custome.

For making the Inventory, the Executor is to take, or call to him two Creditors or Legatees of the Testator, and doe it in their presence, or in their absence or refusall, two honest persons be-

ing the next of his kinne, or in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remaine with the Executor.

The Executor is to make oath for the truth of it.

For a Copy desired by any, either of a Will or Inventory, no more is to be paid than before is allowed for the Registring, with the like election to the Scribe, or Register, as is above said.

Master *Swinborne* saith, that an Executor is to sweare, and, if it should be thought fit, to be bound to make a true account when he shall be thereunto lawfully called by the Ordinary: Of this account see him, *pag* 274. and of accounting some Bookes of the Common Law make mention, as 13 *Edw.* the third, *Fitzh. Exec.* 91. Where *Trew* saith, that of a thing in action, no account shall be before the Ordinary; but *Parn* seemes of a contrary opinion. And elsewhere it is said, that where a debtor is made Executor to the Debtee, he shall yet account before the Ordinary, for this debt: yea as of money in possession, saith one, which others denyed.

An Executor by wrong, shall be drawne to account before the Ordinary, saith *Moyle* Justice. But saith S. *German*, he may not force any to account against the Order of the Common Law; not shewing what that is. And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the ordinary hath no more to doe; *quod non credo.*

Also of the oath of an Executor, divers bookes tell, but not to such purpose as *Swinb.* but truely to performe the Will.

See also 31 *E.* 3. *cap.* 11 An Admini-ſtr. ſhall account as an Executor. *Fitzh. Ex.* 91. & 837. *vid.* 18 *E.* 2. *tit.* Briefe. 48. *E.* 3. 14 15. Of a duty reſting in account, it is ſaid, the legatee ſhall have remedy by account, in the Spirit. Court. 18. *Ed.* 4. *f.* 3. *Moyle.* 4. *H.* 7. 15. *per Wood.* 9. *Ed.* 4. 47. *Doct. et Stu.* 78. *b.* 21. *E.* 4. 22 *Plow. com.* 544. 4. *H.* 7. 15. *Kelw.* 193. 64. *a.*

CHAP.

CHAP. V.

What things ſhall come unto Executors, and be Aſſets in their hands, and what not.

THe things which ſhall come to Executors, are of great multiplicity, and would make a large and confuſed heape, if tyed together in one bundle or lumpe. I will therefore divide and ſort them out in parts, after the beſt manner I can. Firſt, we will divide them into things poſſeſſary, or actually in the Teſtator, and things in action, or not actually in the Teſtator. Secondly, the poſſeſſary into chattels, reall and perſonall, or (as ſome leſſe properly expreſſe it) moveable, and immoveable.

Of Chattells reall poſſeſſarie.

THeſe may be divided into two kinds, *viz.* living, and not living; the living are not many and various. 1. The wardſhip of the body of another, be it by reaſon of a tenure of the preſent owner, or by Aſſignment from the King, or other Lord of whom the tenure was, is a Chattell reall, not perſonall, though it be an intereſt in the perſon of another, but it is in reſpect of a tenure of Land, or other hereditament, and is for yeares, *viz.* during the minority, or till marriage had, and ſo is reall. Next, a Villen for yeares as by Grant for a terme from him that had the Inheritance, is a Chattell reall. As for an Apprentice, for yeares, it is by Cuſtome, as I take it, that he goeth, or is derived to Executors: but for reaſon after ſhewed; I thinke this Intereſt be not in the realty, but in the perſonalty rather. So of a debtor in Execution for debt, the intereſt in

him or perhaps more properly in his liberty, is not as I conceive (for reaſons which after I ſhall expreſſe) a reall, but a perſonall Chattell. The like Law of a Priſoner taken in the Warres. As for Fiſhes in a Pond, Conies in a Warren, Deere in a Parke, Pigeons in a Dovehouſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Parke, and Dove-houſe, they are not Chattels at all, nor to goe to the Executors, but to the Heire with the Inheritance. If the Teſtator were but a Termer, they are to goe to the Executor, but as acceſſary Chattels, following the ſtate of their principall, *viz.* the Warren, Parke, Dovehouſe, Pond, &c.

The reall Chattels, not living, are either in Houſes or Lands moſt uſually, and that three wayes. Firſt, by Leaſe for yeares. Secondly, by Wardſhip of Lands held by Knights-Service. Thirdly, by extent upon Judgements, Statutes, or Recognizances; or in things iſſuing out of Houſes or Lands, as Rents, Commons, Eſtovers, or ſuch like. But where an Inheritor reſerves a Rent upon a Leaſe for yeares, this ſhall not goe to the Executor, but to the Heire, with the Reverſion other than Arrerages behinde, at the death of the Teſtator. Alſo Commons, Corodies for yeares, Advowſons, Tithes, Faires, Markets, Profits of Leetes, and ſuch like, which the Teſtator had for yeares, all which may accrue any of theſe wayes, as the firſt are Chattell and Reall. Yea, one ſimple preſentation to a Church, upon the next avoydance, is a Reall, and not Perſonal Chattell, before it come to be voyd, and what then it is, we ſhall after ſhew. And the title accrued to the Crowne, upon attainder of felony, where the party held not of the King. *viz.*

The

The *Annum diem & Vaſtum*, that is, power not onely to take the profits for a yeare, but to waſte and demoliſh Houſes, and to extirpate and eradicate Trees, and Woods, is but a Chattell, and therefore though granted to one and his Heires, by the King; yet ſhall goe to the Executor, and not to the Heire. *Temp. E. 1. Aſſiſe 124 Fitzh.*

Some doubtfull, or leſſe clecre Caſes, touching Chattels Reall.

FIrſt, where we ſpake of Wardſhip, it is not to be underſtood of Wardſhip, by reaſon of Soccage tenure, for that goeth not to the Executor, but he ſhall be next Guardian, who now after the death of the firſt Guardian, ſhall be next of Kinne, if the Ward continue under foureteene yeares old, elſe he is out of Wardſhip. Secondly, if one have a Leaſe for three lives to him and his Aſſignes, this is no Chattell, nor ſhall goe to the Executor, nor to the Heire, but to him who firſt enters, and claimes it as an Occupant, if no Aſſignment be in the life of the Leſſee made: Contrarily, of a Leaſe for many yeares, if three, or more, or leſſe, ſo long live; this is a Chattell, and ſhall goe to the Executor. So an extent upon a Statute, yet it is delivered to the party as a Freehold, *viz. Vt liberum tenementum*, but that onely makes it to be *quaſi liberum tenementum*, as to the maintaining of an Aſſiſe, if wrongfully put out. Where one is ſeiſed in the right of his Wife, of Land, or other Hereditament, and is attainted of treaſon or felony, the profit thereof accrued unto the Crowne, is but a Chattell, and though the King grant it to one and his Heires, yet it ſhall goe to his Executors. And if *37. Aſſ. p. 11.* *4. E. 3. Aſſ. 166. Bro. Chat. 15.*

one, having a Leaſe for many yeares, *viz.* a 100. 500. or more, or leſſe, and doe deviſe and bequeath the ſame to *A.* and the Heires males of his body, and for want of ſuch iſſue to *B.* and the Heires males of his body, and dyeth, having iſſue a Sonne, the terme ſhall not goe to his Son, but to his Executor or Adminiſtrator, for it cannot be made a matter of Inheritance; ſo if *A.* had dyed without iſſue male, the terme ſhould not have gone or remained to *B.* but to the Executor or Adminiſtrator of *A.* as was lately adjudged in the Exchequor, betweene Sir ***Robert Lewknor***, and Miſtris ***Hamond***. So of an advowſon, or any other hereditament, granted or deviſed to one and his Heires for a 100. yeares; or if ſuch a termer grant a Rent out of the Land to *A.* and his Heires, or the Heires, or Heires males of his body, yet ſhall the ſame goe to the Executor, and not to any Heire; for it being derived out of a Chattell cannot be any Freehold or Inheritance, but it ſelfe, a meere Chattell. *Partus ſequitur ventrem.*

39. E. 3. 37. So *Manwood*, if granted for life it is but a chattell, *Plow. com.* 524.

Of Chattels Perſonall.

PErſonall Chattells, or Goods moveable, are alſo in like manner to be divided into quicke or dead. The quicke are Cattell of all kindes, as Sheepe, Horſes, Kine, Bullockes, Swine, Goates, Geeſe, Duckes, Poultry, &c. There may be alſo in living Creatures reaſonable an Intereſt, as in a Chattell perſonall, as in the perſon of a man taken in execution for debt. And this I hold to be in nature, not a Reall, but a Perſonall Chattell (as before was touched) for that debt is the roote of it, and the body is but a pledge or gage,

diſ-

diſchargeable inſtantly upon payment, releaſe, or other diſcharge of the debt. Like Law of a Priſoner taken in the Warres, for thereof and therein, as in a Chattell, hath the party a legall intereſt: as appeares by a Writ of Treſpaſſe in the Regiſter, for taking away a Priſoner, *viz.* *Quare quendam Scotum priſonarium ſuum cepit, &c.* And note lately, *viz.* In the time of King *Henry* the 8. the King himſelfe, upon the winning of *Bullen* bought divers Priſoners of his Subjects. And by a Statute in the beginning of *Hen.* the 6. his time, this Intereſt in a Priſoner is mentioned as valuable, and comming from one King unto another; therefore doubtleſſe ſhall goe from Teſtator to Executor by death, and not be inſranchiſed or freed thereby. The intereſt which one hath in an Apprentice, I take to be rather Perſonall than Reall, though for yeares, becauſe not ſpringing out of any Reall roote, as Wardſhip, and Villenage doe; but out of a meere contract. As for a Servant whoſe Maſter is dead, doubtleſſe he is legally diſcharged, and is not Servant either to Heire or Executor; but meete and honeſt it is, that one of them continue him in ſervice till a fit time of providing him a new Maſter, and fit for him, not to depart ſuddenly. Now for things perſonall without life; Theſe are evident, *viz.* all Houſeholdſtuffe, Implements, and Vtenſils, Money, Plate, Jewels, Corne, Pulſe, Hay, Wood felled, and ſevered from the ground, Wares, Marchandiſe, Carts, Plows, Coaches, Saddles, and ſuch like moveable things.

No. na. br. 88. *Reg. original. f.* 102. There is mentioned that the priſoner was to have a 150 l. for his ranſome. *Bro. no. ca.* 295. *& tit. Property* 38. 1. *H.* 6. *c.* 5.

10. *E.* 4. 14. 15. Come of wilde ones, 22. *H.* 7. *Kelw. rep. f.* 88. 118. *Cal l.* 11. *f.* 50. 18. *H.* 8. 2.

More doubtfull Caſes touching things perſonall.

FIrſt touching things living: If the Teſtator had any tame Pigeons, or Deere, or Conies, or

Fesants, or Partridges, these all aswell as Chickens shall goe to the Executors; so though not tame, if they were taken and kept alive in any Roome, Cage, or like Receptacle, as Fesants and Partridges often be, so fish in a Trunke, as also young Pigeons, though not tame, being in the Dovehouse, not able to flye out; yet their Dams, the old ones, shal go to the Heire with the Dovehouse. And if the Testator had any reclaimed Hawkes, they also as Chattels Personall shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Greyhounds, and Spaniells, be not so commonly bought and sold, nor so anciently have beene, yet are they now growne to be a Marchandize; and why not? for although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as Instruments of Musicke, both tending to delight and exhilarate the spirits. A cry of Hounds hath to my sense more spirit and vivacity than any other Musicke: Adde hereto that there may be some profit, and advantage gotten by them, both *quoad adeptionem boni, & ademptionem mali*, the getting of some good food, and the preserving of others, as Lambes, Conies, Fish, Poultry, by killing Foxes, wild Cats, and others, which destroy them. And we know that money is recoverable in dammages for taking away such, or a Mastiffe, serving to keepe an house. So of Ferrets to catch Conies, &c. Therefore they are valuable. But it may perhaps be objected that none of these above are Cattell, and therefore not repleviable, consequently no property in them, for when more then one living Chattell is distrained, the *replevin* is to be by the name of *Averia*, signifying Cattell. For answer, not to insist that one may have

10. E. 4. 14 15. & 18. E 4. 8. So of young Hawkes in the nest. It is felony to steale these *Ergo.* they be goods.

So an Hunters horne, a Falkoners lewer. Hares, Deere, Fesants, Partridges, wild Ducks &c. are good meate

haue property in divers things, whereof no *replevin* lyeth, as Corne or Hay, not in Sackes nor Carts, money not ſhut in bagge, nor boxe, &c. I further ſay that even the word *Averia* may be applyed to theſe, for ſo I find it to Hens and Capons in the Booke of Entries, *viz.* in the writ of *Curia Claudenda*, where the Plaintiffe complaines of the Defendants, not making his *Mounds per quod averia ipſius. A. viz. Capones, Gallinæ & alia Averia ipſius, A.* that is whereby his Cattell, *viz.* Capons and Hens and other his Cattels came into the Plaintiffes Houſe and Garden to his dammage, &c. And both *Newport*, and *Newdigate* hold that a writ of *replevin* lyeth of ſuch things, though *Brudenell* were of contrary opinion, yet he alſo held an action of Treſpaſſe maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life, and firſt to thoſe abroad in the Fields. Put the caſe that a man dyes in *July* (before Harveſt I meane) ſeiſed for life, or in Fee, or Taile, in his own right or his wives, or eſtated for yeares, of Land, in the right of his Wife, being ſowne with Corne or any manner of Graine, the common ſaying is, *Quicquid plantatur ſolo, ſolo cedit*, yet this ſhall goe to the Executor of the Husband, and not to the Wife or Heire, who ſhall have the Land: but Hay growing, *viz.* Graſſe ready to be cut, Apples, Peares, and other fruite upon the Trees ſhall goe to the Wife, as alſo if they had been upon a mans owne Land of Inheritance, they ſhould goe to the Heire, though the Corne ſhould goe to the Executor. The reaſon of difference is, becauſe this latter comes not meerely from the ſoyle, without the induſtry and manurance of man as the other doe: and I take Hoppes though not ſowne, if

Fa. 142.

Hen. 8. f. 3.

Roots of Carrots, Parſnips, Land ſown whereon is ripe Corne.

plan-

planted, and Saffron, and Hempe, because sowne, to pertaine as Corne to the Executor. All those yet shall passe to one, to whom the Land is sold or conveyed, if not excepted, though never so neere reaping, felling or gathering. But what if the Wife had the Lease for yeares as Executor to some former Husband or other friend, and the Husband after sowing dyes, who then shall have the Corne? Certainely the Corne shall goe to the Executor of the last Husband, at least so much as is more than the yeares value of the Land, or the making it up by addition of other things, for the value is to be Assets for payment of debts and Legacies. Put the case againe, that the Husband and Wife were joynt-tenants of the Land, and then the very Corne growing shall survive to her, together with the Land, and though the Husband sowed it, yet shall it not goe to his Executor. Being in consideration of things growing on the ground, let us not forget to thinke of Trees sold by *I.S.* seised of the Inheritance of the Land to *I.D.* who dyeth before felling, this Interest is a Chattell which shall goe to the Executor, and not to the Heire of *I. D.* but some colour may be that these, because fixed to the soyle and Freehold, are reall Chattells, as the Interest in Land is, and not personall: So also of Trees Excepted by him who selleth the Inheritance of the Land, but in both cases I conceive this Interest to be personall, and not reall; for that, as it is a propriety of Chattell in the Vendee, or Vendor with exception, it stands in consideration severed and abstracted from the soyle, or ground where the Trees grow, though the Trees be not actually severed by the Axe from their mother Earth. But if the Lessor for yeares or life except

For he was Tenant for life in effect.

The Wife also shall have convenient apparell. 33. *H.* 6. 31 2. *Eliz. Dy.*

Co. l. 11. *f.* 48

except the Trees, theſe continue parcell of the Freehold and Inheritance. And after Corne reaped, and before the Tithe ſet out, the Inheritor of the Tithe dying, I thinke the Executor, and not the Heire, ſhall have the Tithe after ſet out.

Now let us come home to the Teſtators houſe, and ſee in and about it; ſome doubts, what pertaines to the Heire, and what to the Executor. Queſtion hath beene of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers, or Brewers, Pales, Rayles, Glaſſe in Windowes, Tables *Dormants*, Wainſcotes, Doores, Lockes, Keyes, and ſuch like, to whom theſe ſhould goe? whether to the Heire or Executors? And in the latter end of *Hen.* the 7. his time, an Executor taking a Furnace which was ſet in the middle of a houſe, and not fixed to any Wall, the Heire brought an action of Treſpaſſe againſt him for ſo doing, and it was adjudged for the Heire, *viz.* that this was to goe as part of the Freehold, and Inheritance to the Heire; and long before in *Edward* the third his time, it was debated whether it were waſte in a Leſſee to remove or take away a Furnace or not, but I find no opinion delivered by the Judges: But in the late Queenes time, Juſtice *Walmſly* ſaid that the Lord *Dyers* opinion was, that where the Furnace is not fixed to the Wall, the Leſſee might within his terme take it away. Contrarily, if it were fixed to the Wall, for then it ſtrengtheneth the houſe. And yet notwithſtanding it might be in the one caſe ſo removed by the Leſſee, yet is it not there, as he ſaid, a Chattell perſonall or moveable, ſo as it is attachable; and there the caſe being that a Clothier being a Termer of an houſe, had fixed a Copper to the Wall, with

Of Houſes, or things about the Houſe.

42. E. 3. 6.

21. H. 7. f. 26.

42. E. 3. f. 6

H. 37. Eliz. Auſtins caſe.

Loomes

Loomes and prickes neceſſary for his Occupation, a Judgement being had againſt him, the Sheriffe delivered the Copper in Execution as a Chattell, and after the Leſſee tooke it up, and it was taken from him by vertue of the Execution; whereupon he brought an Action of Treſpaſſe, and by all the Judges, the action was maintainable. And whereas it was found by the Jury, that by the Cuſtome of *Kent*, the Leſſee might remove ſuch a Copper; Juſtice *Beaumond* ſaid, that without any Cuſtome, a Leſſee might ſo doe at any time during his terme. But it is to be noted in the ſaid caſe, that the Furnace was by it ſelfe delivered as a moveable Chattell, and not as part of the houſe, for that was not medled withall, nor at all delivered in extent (as in the Caſe betweene *Miles* and *Prat*, where both houſe and Copper were delivered upon a Statute) the houſe belike being held upon ſuch a rackt rent, as that the party did not deſire to have it, for he might have had the whole being a Chattell, and ſo have uſed the Copper during the terme. And as touching all other fixed things, the Law was taken in the ſaid caſe in *Henrie* the 7. his time, to be all one, as in the caſe of the Furnace, *viz.* that they ſhould goe to the Heire, ſave onely that for Glaſſe in the Windowes, *Pollard* ſaid it was otherwiſe, *viz.* that that ſhould goe to the Executors, which none there denyed. But ſince, in the late Queenes time it was otherwiſe reſolved touching glaſſe, that it ſhould not goe to the Executors, and the like was there ſaid, touching Wainſcotes, and ſo alſo by the Lord *Ander*, in the ſaid caſe of *Auſtin*. And touching Poſts fixed, for that they be parcell of the Freehold, ſo alſo of Millſtones, Anvills, Doores, Keyes, Windowes,

Co. lib. 4. f. 93. 64.

dowes, none of theſe be Chattells, but parcell of the Freehold, or thereto pertaining, therefore, not the Executors.

Things in Gardens.

Now to come to Gardens alſo: whereas, I before laid downe a difference betwixt things ſowed, or not ariſing from the Earth, without manuring, and ſuch as grow of themſelves; It will thence be concluded that the roores of Carrets, Parſneps, Turneps, Skerrits, and ſuch like, comming and ariſing from yearely ſowing, muſt goe to the Executor, and not to the Heire; the caſe being ſo, that the Gardner and Sower had the Inheritance of the Garden, or Soile, now though in moſt places this can rarely be a queſtion of value, yet about *London*, and ſome great Townes it may, and therefore not unworthy of a line or two, a thought, or two, the rather for that the reaſon of this caſe may give light touching right in other Caſes. And in my opinion theſe notwithſtanding, there is a ſowing and manurance to generate them, and cauſe their being, ſhall goe to the Heire and not to the Executor: my reaſon is for that the thing of profit is the roote which is hidden in the ground, and I hold it no reaſon, nor agreeable to Law, that the Executor ſhould digge and breake the ſoyle and ground to ſearch for her entrailes; he is to content himſelf with that which is above ground as Melons of all kindes, and the like whoſe fruit is above the ground; but as for Artichoks, though the fruit be above the ground, yet I thinke they have no ſuch yearely ſetting, or manurance as ſhould ſever them in intereſt from the ſoyle, therefore they ſhall goe with it to the Heire.

Let us now conſider of things, though not fixed to, yet uſually kept in houſes, *viz.* writings and evidences, whereabout generally, no doubt can

can be, but that they follow the intereſt of the Land, ſo as if they touch inheritance, they pertaine to the Heire, if but Termes, Goods, Chattells, or Debts, they pertaine to the Executor, yea ſo doe Statutes, and Bonds in Law (howſoever otherwiſe in equity) though they conceme the aſſurance and enjoying of Inheritance purchaſed. What if *A.* morgage the Inheritance of Lands to *B.* upon condition of redemption by payment of 500. pound to *B.* his Heire, or Executor, and *B.* dyeth, the Deedes being delivered into his hands; now the Heire, nor the Executor, ſhall have them; for though the money may be paid to the Executor; yet meane time the Land deſcends to the Heire, nor is there any debt to the Executor, for *A.* may chooſe to pay, or not. Put it on the other ſide, that the Land had beene ſold for 500. pound, not paid to *A.* but a Condition that if not paid to him, his Heire or Executor, by ſuch a day, then to re-enter; and *A.* dyeth, here is a debt to the Executor, and no Land deſcended to the Heire of *A.* yet ſhall the Heire have the Deedes, for that a Condition is deſcended to him. Queſtion hath beene touching Boxes and Cheſts, wherein the Evidences concerning Inheritance are; and although the better opinion in our Bookes, doth pitch upon this difference, that where they are ſealed up, they ſhal pertaine to the Heire, otherwiſe, where not ſealed; I cannot conceive that difference to be grounded on good reaſon; but rather thinke that Boxes, which have their very creation to be the houſes or habitations of Deeds, ſhould, as appurtenant to them, goe to the Heire, whether ſealed or not. On the other ſide Cheſts made for other uſe, *viz.* the keeping of Napery, or Apparell,

41. *E.* 3. 2.
36. *H.* 6. 26
18. *Ed.* 3. 4.
3. *H.* 7. 15.

parell, ſhall not, as I conceive be taken as appurtenant to Evidences, becauſe ſome be in them, for ſo may other things alſo be: Nor as touching them can ſealing be of any effect, but rather locking, and not locking muſt make the difference touching them, if any difference by incloſure.

Qua. If ſole uſe that way make a difference or not.

CHAP. VI.

Of things not actually in the Teſtator, but accruing to the Executors, by or after the Teſtators death.

THeſe be of divers ſorts, the firſt and chiefe whereof are things gotten and acquired by Action or Suite, Secondly by Condition or Covenant without Suite. Thirdly, by Remainder.

See Stat. 32 H. 8. cap. 37. Remedy for Rents of Inheritance, or for life. A Church of the Teſtat. Inher. become voyd in his life, comes to the Exec. as a thing in action but is not Aſſets, for not vendible.

Of things in Action.

TO ſpeake firſt of the firſt, it is cleare that debts due to the Teſtator, be it by Bond, Statute, or Judgement, or for Arrerages of Rent, are not Aſſets to charge the Executor, untill receipt of them, and it is as cleere that the Actions to recover theſe doe pertaine to the Executor, and that the debt and dammages recovered ſhall be aſſets to charge the Executor. So alſo of Actions of *Detinue*, and of covenant for any thing perſonall, or any Chattell Reall, Leaſe, Wardſhip or the like. But perhaps ſome will doubt of Covenant

Covenant touching Inheritance, *viz.* the assurance of Lands or enjoying thereof, free from this or that incumbrance or the like: Yet even in those cases, if the Covenant were broken in the Testators life time; I thinke clearely the Action is accrued to the Executor, for that his Testator was to recover dammages in the Action of Covenant for that breach, and he being intituled to these dammages as principall, and not any accessary thing in that action, the Law hath cast that action upon the Executor. And that is the cause why, if waste be committed in the life of the Lessor by his Lessee, and then the Lessor dyeth, his Heire can have no Action for this waste, *viz.* because he cannot recover the treble dammage, as neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heire.

11. *H.* 4. 32. 45. *E.* 3. 3. *No. Ma. br.* 59. 4. *E.* 3. *c.* 7. And the like given to Executors of Executors *per stat.* 25. *E.* 3. *c.* 5.

That an Executor at the Common Law could not maintaine an Action of Trespasse for goods of his Testator, taken away in his life time, seems to be implyed by the Statute in the time of King *Edward* the third. Which gives such action: Yet it seemes that a *Replevin* was maintaineable by the Executor, at least in some cases for goods taken or distrained in the Testators life time: But in case the distresse were for Rent, Service, it is said a little after the making of that Statute, that the Lord may not now avow for his Rent, or Service, because his Tenant is dead, but must set forth the matter, and thereupon justifie to excuse himselfe from answering dammages, and the Executor shall by this Action recover the Cattell or Goods, and that by the Common Law saith the Booke, though the Statute of *Marlebridge* had never beene made, for that the property

17. *E.* 3. *Fit.* 106.

c. 21. meant *ut credo.*

perty remained in the Testator. Note it speakes not at all of the said Statute of 4. *Edward* the 3. But *Newton* in the time of King *Henry* the 6. would have it that the Executor in that case should not have a *Replevin* but an Action of Trespasse grounded upon the said Statute, *viz.* 4. *Ed.* 3. Which me thinkes cannot be by any meanes, by reason of the Statute of *Marlebridge cap: 3. Non ideo puniatur dominus, &c.* for the Executor, as well as his Testator, is thereby restrained as I thinke, from the Action of Trespasse against the Lord. As for that no Avowry can be made upon the Tenant, that is now remedyed by a late Statute; The other Statute hath been taken to extend to other things than goods moveable, for where a Church becomming voyd, a stranger presented thereunto wrongfully, and the Patron dyed, it was resolved in the late Queenes time, that the Executor might by the equity of the said Statute, maintaine a *Quare impedit*. But whether an Action of Trespasse lyeth for an Executor, against him who spoyled the Testators Corne, Grasse, or Wood, growing, hath beene questioned, but no where resolved to my knowledge. I thinke it may lye with some difference: First, for that the Statute of 4. *Edward* the 3. doth not onely speake of Goods carryed away, as limitting the Law to that trespasse soly and particularly, but speakes generally, of Trespasse done to Testators; and then brings in that particular of goods, as one Instance. Now there be many cases of instances or ensamples given in acts of Parliament, which yet do not restraine the remedy or *purven* to that particular, or from extending to other cases of like nature. Thirdly, the Statute speakes of Trespasses remaining unpu-

21. *H.* 6. 1. but *Markeham e contra*

21. *H.* 8. *ca.* 19. 4. *E.* 3.

The B. of *Coven.* & *L.* and *Sales* case *M.* 32 & 33. *Eli. in com. ba.* So of Ravishment. *Dl. gard.* 7. *H.* 4. 2. & 7 *H.* 4. 6. *E. rest. Farm. et Tild. De clauso fracto* meerely it lyeth not. 11. *H.* 4. 3.

This *Perian Inst.* did very judiciously urge in *Sales* case *supra.*

niſhed, which it meant to redreſſe: But it ſhould ſtill leave many unpuniſhed, if it ſhould have no larger extent, than to that one ſingular treſpaſſe, of Goods taken away, *viz.* moveables. Againe, the Teſtator was clearely intituled to a recovery of dammages for this other treſpaſſe, which if he had recovered, ſhould have come to his Executor; Yea the things themſelves, all if felled in the Teſtators life, and part though not felled, ſhould have come to the Executor, therefore alſo the dammages recoverable in liew thereof, out of which recovered, the debts and Legacies of the Teſtator are to be ſatisfyed. Beſide, this Action of Treſpaſſe is a thing ſevered from the ſtate of the Land, ſo as if the owner thereof had, after this treſpaſſe done, aliened the Land, yet had this Action remained to him, as I take it, clearely. And why not as well as where a Treſpaſſe is done upon the Land of the Leſſee, and then the terme expires, this doubtleſſe doth not take away his Action, nor his Executors. But me thinkes here may be ſome differences probably taken, as firſt betweene a Treſpaſſe in deſtroying or taking away Corne growing, and a treſpaſſe in Graſſe, or Wood growing: for the firſt being of that nature, as that, though the Owner had a ſtate of Inheritance in the Land whereon it groweth, and ſhould have dyed before ſeverance and felling, Yet it ſhould have gone to the Executor, and not with the Land to the Heire, therefore doubtleſſe doth the Action for deſtroying or taking away thereof, accrue by the operation of Law to the Executor, in liew of the thing taken or deſtroyed. Otherwiſe, perhaps of Wood or Graſſe, Which by the Owners death ſhould have gone to the Heire, and not to the Executor. And yet

here

here againe another difference me thinkes may be betwixt Graſſe and Graſſe, *viz.* betwixt that in Paſture and that in Meddow, yearely mowed and turned into Hay, not left to be conſumed by the mouthes of Beaſts, as that growing in Paſture: For as the Law diſtinguiſheth betweene theſe Soyles, gives precedency to Meddow, and makes it waſte for a Leſſee to Plow it up, not ſo for Paſture. Yea, Tithe is payed of Hay, but not of Graſſe growing in Paſtures, ſo the Meddow Graſſe being in the Owners purpoſe and intention, as a thing ſevered from the ſoyle, ſhould me thinkes ſo be alſo in the eye, and eſtimation of the Law, and therefore ſtand in a different ſtate, and account from Paſture Graſſe. A third difference may be in the manner of the Treſpaſſe, *viz.* Where the Meddow Graſſe is eaten up with Cattell by a Treſpaſſer, and where by him mowed and carryed away as Hay, for in this latter caſe an Action of *Trover* and *Converſion* for ſo many loades of Hay, is doubtleſſe maintainable by the Executor, though it ſhould be admitted that in the other caſe of conſumption by the mouthes of Beaſts without ſeverance, no Action ſhould be maintaineable by the Executor, which yet I admit not, but thinke the contrary probable. For when Meddow ground, which yearely conceiveth (*Solſine homine generat herbam*) ſhall be ready to be delivered of her burthen, if a ſtranger putting in an head of Cattell, which ſwallow up, and tread downe this fruite of her wombe, before the Mower with his ſithe come as a Midwife to helpe her delivery, if then by the haſty death of the Owner, before Action brought, this great Treſpaſſe ſhould be diſpuniſhable, it were contrary, as me thinkes, to the purpoſe of the ſaid

At leaſt me thinkes; Action upon the caſe here and before ſhould be maintaineable.

Stature, and a great defect in the Law. Yet here perhaps touching this, a fourth difference may be, or arise out of the time of the death of the Owner, *viz.* where he dyeth before time of Mowing, and where not; for *Dato* that in the former case, because, if such destruction or consumption had not beene; yet the Owner dying before severance, this should not have come to the Executor, but have gone with the soyle to the Heire, that therefore the Executor, who is not damnifyed should recover no dammages. Yet in the other case, the Owner living till after Hay time clearely passed, *viz.* till the end of *August*, me thinkes now since this fruite of the Meddows wombe should have beene a Chattell severed, had not this Trespasser made unlawfull prevention: Therefore the Executor, to whom the same should have come, towards the performance of the Will, should have out of the said Statute, an Action, and remedy, reached unto him to recover recompence in dammages for this wrong done in *retardationem Executionis Testamenti*. A fifth and last difference may perhaps be in the state of the Owner, for *Posito*, that where the Land is his Freehold, or Copyhold Inheritance, no Action should be given to his Executor, for Wood, or Grasse taken or destroyed in his life time; yet where he is but Tenant for yeares, Guardian, or Tenant by extent, so as the very state in the Land was to come, and is come to the Executor (together with *Quicquid plantatur solo*) me thinkes the Executor should have, together with the state in the soyle, the Action to punish the Robber of, or Trespasser upon the soyle. Thus having scanned and sifted, to the best of my ability, all differences and cir-

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cumſtances of this point, how farre I am wide, and wherein right, *Aliorum ſit judicium*, or rather, *Altioris eſto judicii*. But this is cleare, that whereſoever Executors doe recover any dammages for treſpaſſe or other wrong, done to their Teſtator, the money recovered (at leaſt, if Execution be had, or money received) will be Aſſets in their hands, as well as debts recovered upon Bonds or Bills, or Lands, by them taken in Extent, upon Statutes, Recognizances, or Judgements. Yea, without ever having theſe moneys, Executors may make them Aſſets in their hands, *viz.* by making Releaſes, or Acquittances, or acknowledgement of Satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors, with the whole penall ſumme, though haply they receive but part as the principall, or ſome like proportion. Therefore, there is great caution to be uſed by Executors in this kind, that unleſſe they be ſure they have Goods ſufficient to pay all Debts, and Legacyes, they make no Releaſe, Acquittance, or Acknowledgement of Satisfaction, for more then they doe receive. be it debt or dammages. And the like caution to be uſed by them, touching ſubmiſſion of debts or dammages, to arbitrement whereby diſcharges of the ſame may grow, for the ſubmiſſion to the Arbitrement, being their voluntary act, although the Arbitrators by their judgement doe diſcharge the debt or dammage in part, or in whole, yet ſhall the Creditors have like remedy thereupon, againſt the Executors, as if they had releaſed, or, which is more, received the ſame.

3. *H.* 6. 3. *Littleton f.* 42. 4.

So held in *Sales* caſe of dammages in *Qua. impe.* recovered *conte* of the preſentment. Releaſing. 13. *Ed.* 3. *Fit.* 91.

Error 11. *H.* 4. 65. 46. *E.* 23. Yet upon a verdict in *Qua. impe.* the Wife, not the Executor of Husband did ſeiſe. 9. *H.* 6. 5. 4.

Other Actions there be of diſcharge, which as the Teſtator himſelfe in his life time might have

had, ſo may his Executor after his death, *viz.* Writs of Error, Attaint, Diſceyt, *Audita Querela*, *Identitate nominis*. But this laſt is given by Statute. Whatſoever is regained by any of theſe wayes, as unduely loſt by the Teſtator, ſhall alſo be Aſſets.

Speciall caſes pertinent to the Premiſſes.

1. *Chattells come to Executers from the Teſtators, yet not Aſſets.*
2. *Aſſets which be no Chattells.*
3. *Things in Action, and in the perſonalty turned into Chattels Reall*, & è contra.

AS to the firſt, I exemplifie thus, *A.* makes *B.* his Executor, and dyes, *B* makes *C.* his Executor, and dyes. The Goods left by *A.* to *B.* as Executor, farre exceed his Debts, and Legacyes, or let us ſuppoſe no Debts nor Legacyes of *A.* and that *B.* dyeth much in debt, above the Goods he leaveth, and did make no alteration of the property of the goods of *A.* but meerely left them to *C.* his Executor. Now ſhall not the Goods which came to *B.* as Executor of *A.* and ſo from *B.* to *C.* be lyable in Law, to pay the debts of B. yet in Conſcience me thinkes they ſhould, and that *C.* ſhould not receive them to his owne uſe, as in Law he may, where *A.* left no debts. But if *A.* making B. Executor, did alſo by his Will give him all his Goods, and he in his life time made election to have them as Legatee; or by his Will, did ſo diſpoſe of them, or appoint them to goe, as the Goods he had as Executor, could not be given or diſpoſed; Now by this election they were altered in property from being his as Executor,

cutor, and ſo as his owne goods ſhould be liable to his debts. But things in action could not be ſo given, or diſpoſed, *viz.* Debts, &c. yet if *D.* were indebted to *A.* one hundred pound, and B. his Executor, tooke new bond of him, or another for it, giving up the old Bond, now was it become his owne duty, and ſo ſhall ſtand in his Executor.

Another inſtance of this, thus; If *A.* Patron of the Church of *D.* grant to B. the next avoydance, the Church becomes voyd, B. dyes before he preſents, his Executor preſents, and hath the benefit of preferring his ſonne or friend, yet ſhall this make no Aſſets in his hands for payment of debts; for that he could not lawfully take money to preſent. But if B had dyed before the Church had become voyd; Then becauſe the Executor might lawfully have ſold it, the value ſhould be Aſſets in his hands, as I conceive, except perhaps the incumbent had dyed ſo haſtily after B. that the Executor had not time convenient to find out a chapman, and to ſell it.

Or if a ſtranger uſurpe in his life, and he dying, his Executor recovers in a *Qua. imp.* as by *Sales* was done *infra. Mich.* 32. and 33. *Eliz.* So held in *Sales* Caſe, *in com. ba. Vendere jure poteſt, avocat ipſe priùs.*

If in the other Caſe, a ſtranger had preſented and got his Clarke admitted, and the Executors of B. had in a *Qua. Imp.* recovered dammages, the money ſo recovered ſhould have beene Aſſets. Thus much of the firſt, *viz.* that ſome things of the nature of Chattells, may come to Executors, and yet not be Aſſets.

Touching the ſecond, *viz.* that ſome things may be Aſſets in the hands of Executors, which yet are no Chattells; I ſhall give but two Inſtances. Firſt, where a man leaveth a Villen for yeares to his Executors, and the Villen purchaſeth Land in Fee-ſimple, and the Executor entreth into the Land; now hath he Fee-ſimple

22. *H.* 8. *Br. Villenage* 45 If he dye, how ſhall this be Aſſets in the Heire.

therein; and this Land is Assets for payment of the Testators debts. So, if a man by his Will, give Lands in Fee to his Executors, to be sold for performance of his Will. These (before the money thereby raised) are Assets, both for payment of debts, and of Legacies: But if the Lands had beene given to be sold onely for payment of debts, they should onely be Assets for that purpose, and not for payment of Legacies: and so, if it were expressed to be for payment of Legacies singularly, this should not be Assets for debts, as I take it. For since these are not Assets of their owne nature, but so made by the Will and disposition of the Testator; me thinkes they cannot be otherwise, nor farther Assets than as the Testator hath willed and disposed; but though Lands thus given were Assets before the *Stat.* 21. *Hen.* 8. *cap.* 5. Yet how can it be so, since for the very words of the Statute be, that if one will by his Testament or last Will, any Lands, &c. to be sold, neither the money thereof comming, nor the profits taken, shall be accounted as any of the goods or chattels of the Testators, which I conceive to be all one, as to say, that they should not be Assets; for when an Executor denyeth himselfe to have Assets, the forme of his plea is, *Quod nulla habet bona nec catalla*, &c. Yet since that Statute, *viz.* in the late Queens time, the Law was twice admitted, or conceived still to be according to the third of *Hen.* 6. *viz.* that the Land devised to be sold, or the money thereof comming should be Assets. Indeed, in neither of those Bookes, is there any mention of the clause in the said Statute; and it is possible that it might be forgotten, as in other Cases sometime hath happened, But casting about how

3. *H.* 63. & so 2. *H.* 4. 21. If by Feoffment *per Markam cap. Iust. con. Rick-hill.*

See 9 *El. Dy.* 264.

9. *H. D.* 264. 14. *H. D.* 31.

to

to reconcile thoſe Bookes with the ſaid Statute, and not to ſuppoſe the ſame forgotten at both times, both at the Barre, and Bench (though being but a ſhort clauſe in the middle of a large Statute to other purpoſe, it might well ſo have beene) at the laſt, though not haſtily I grew to conceive, that the ſaid clauſe being in an Act which limitteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceaſed, and then bringeth in this clauſe, that the Lands willed to be ſold, ſhall not be accounted as any of the goods, &c. The Parliament meant thereby only to exclude them to this purpoſe, that they ſhould not be accounted as part of the goods in the valuation, according to which the ſaid Fees were to be rated; and though the words be generall, that they ſhall not be accounted as any of the goods, &c. yet is it the more probable, that the Parliament meant no further then as aforeſaid, becauſe that clauſe after the Fees limitted in anſwerableneſſe to the values, is brought in by a *Proviſo, viz.* provided alwayes, that if the deceaſed Willed any Lands to be ſold, the money nor profits ſhall not, &c. And thus perhaps it was underſtood and conſtrued in the ſaid late Queenes time, though no mention be of any remembrance of that clauſe or proviſion in either of thoſe Caſes reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the perſonalty, into the realty, *& e contra*, I ſhew it thus: if a debt were due to the Executor, as Executor, by Statute, Recognizance, or Judgement, and he ſue Execution, and have Land of the debtors in extent; now is the perſonall duty turned into a chattell reall. On the other ſide,

ſide, if ſuch an eſtate by extent, or a Leaſe for yeares mortgaged come to an Executor, and the debtor, or mortgager payeth the money due; now are theſe reall chattels turned into Aſſets perſonall.

Another ſpeciall Caſe of Equity oppoſing Law.

IF *A.* be bound to *B.* by Bond, Statute, or Recognizance for aſſurance of Land, *B.* dyeth, and the Land deſcends to his heire; or be it that *B.* ſold the Land to *C.* and aſſigned to him the Bond, Statute, &c. yet muſt the Suite, or taking out of Execution, be in the name of the Executor of *B.* and neither of the heire, nor Aſſignee. And that which is recovered, or gotten in extent, will be Aſſets in Law to charge the Executor, as I take it, yet in equity it pertaines to the Heire or Aſſignee. *Quære*, if the Executor meddle nor, but onely ſuffer his name to be uſed.

Of things come to Executors by Condition.

FIrſt, we will conſider of Conditions bringing backe to Executors goods, or chattels granted away by their Teſtators. Touching which, there is no doubt, but if the Condition be any other than for payment of money, or other things valuable by the Teſtator, or his Executor, the chattell returning to the Executor is Aſſets in his hands: as put the Caſe a Leaſe for yeares, Horſes, Sheepe, Plate, or other Chattell, were granted by the Teſtator to *A.* upon condition, that if *A.* did not pay ſuch a ſumme of money, or doe ſuch other Act as the Teſtator appointeth, and this condition is not performed after the Teſtators death,

Note Diff.

death, now is the chattell come backe to the Executor, and is Aſſets. But the queſtion hath beene (and perhaps may be) where the condition is, that the Teſtator or his Executors, ſhall pay the money to make voyd the Grantee, and accordingly, the Executor after the Teſtators death payeth the ſumme out of his owne purſe, not having any money of the Teſtators in his hands: in this Caſe comming in queſtion, *tempore Hen.7.* It was reſolved at the laſt, that this redeemed chattell ſhould not be Aſſets, but be to the Executor as his owne proper goods, though at the firſt, three Judges were of contrary opinion, *viz.* that the goods redeemed ſhould be in the Executor, as goods of the Teſtator. And truely I muſt confeſſe, that I cannot yet find good ſatisfaction in that Bookes reſolution, except we ſhall take the Caſe there to be ſuch as that which is put and reported by the Lord *Dyer*; *tempore Hen.* 8. *viz.* that the money payd for redemption, was as much as the full value of the goods, pledged, or mortgaged, or elſe ſhall admit the Caſe to be, that this redemption was not by payment at the day conditioned. As to the firſt, it were rare, that any ſhould lend money upon a mortgage, where the thing mortgaged, is not of better value than the money lent; rare alſo, that an Executor ſhould take care to redeeme with his owne money, that which ſhould yeeld no benefit or advantage to him, or his Teſtator. Let us therefore ſcanne and examine the Point, ſince the ſame may come frequently in uſe; and this we may the more decently doe, becauſe the Lord *Dyer* in the Margent of the Caſe by him reported, as aforeſaid, ſaith expreſly, that the ſaid other *temp. Hen.7.* was not at all adjudged, himſelfe 21. *Hen.7.*

ſelfe having viewed the Roll, which he there ſets downe, and the names of the parties. We will therefore put the Caſe thus. *A.* poſſeſſed of a Leaſe for ſixtie yeares, of one hundred pound Land, mortgageth it for five hundred pound, or be it that the mortgage or pledge be of a Jewell, or peece of Plate for halfe the value, and that before the day limitted for payment, and redemption *A.* having made B. his Executor, dyeth, & B. at the time & place maketh payment, as was conditioned. Now the queſtion is, whether this Leaſe Plate, or Jewell, being worth much more than the ſum for which it was mortgaged, ſhall be in him wholly in his owne right, and to his owne uſe, or partly, if not wholly, as Executor to *A.* ſo as to be ſubject to the payment of Debts and Legacies. Here it muſt be cleerely admitted, that B. was inabled to this redemption onely, and meerely by the Condition annexed to the mortgage, or pledging. It muſt alſo be admitted, that this Condition, and the power or intereſt to take benefit thereof to him; came, and was derived onely as Executor of *A.* This being premiſed, it muſt needs follow, as to me it ſeemes, that the Condition working, and having his operation in the redemption to deſtroy the Grant, mortgage, or pledging, it muſt needs make theſe againe the Teſtators goods, *in ſtatu quo prius*, and ſo to be in B. as Executor; ſince in that right onely, he was intituled to take benefit of the Condition. For what is it which hindred before this, from being the Teſtators goods; nothing certainely, but onely the force and ſtrength of the mortgage or pledge: Now by the redemption, that is become voyd, and hath it loſt its force; therefore the property of theſe things muſt needs now

now bee; as if no ſuch mortgage or pledge had beene, or as if it had at the firſt beene voyd, and of no force: Thus muſt the Condition work for him, who made it, viz. *A.* the Teſtator, and thoſe of the contrary opinion in the time of King *Hen 7.* doe yet ſay, that by this redemption, the Teſtator is ſo much indebted to the Executor, as he diſburſed for the redemption; which could ſtand with no reaſon, unleſſe by it the property and intereſt ſhould be reduced to the Teſtators behoofe. That thus it is, is alſo proved, as to me it ſeemes, by the Caſe of mortgage of Inheritance, upon which the heire making payment, according to the condition, is not now in as a new purchaſor, but as heire, ſo as he ſhall have his age, and be in Ward, even for this Land: Yea, it ſhall be Aſſets in his hands for ſatisfaction of his Fathers, or other Anceſtors debts, which in ſome reſpect is a harder Caſe than that of the Executor; for he hath meanes to ſatisfie himſelfe of the money diſburſed, either out of the thing redeemed, or other goods of his Teſtator, but the heire hath no ſuch meanes. Yet it will be asked, how the Executor can be free from miſchiefe, for if this thing redeemed be intire, as the Cup or the Leaſe, the whole will be taken in execution for the Teſtators debt. To admit this, yet here is one cleare way of remedy, viz. the Executor may before ſuch Execution, ſell the thing, and ſo pay himſelfe, and retaine the ſurplusage to the Teſtators uſe, and the like of this is frequent in uſe, viz. for Executors to pay of the Teſtators debt, with their owne money, and to make themſelves ſatisfaction out of the Teſtators goods. Beſides, it is not impoſſible, that this redeemed thing ſhould be thus in intereſt parted,

that

that anſwerably and proportionably to the ſum diſburſed for redemption, with reference to the value of the thing redeemed, a moyety or third part, or three parts thereof ſhould be to the Executor in his owne right, as his owne proper goods, and the reſt in him as Executor. As *poſito* that *A.* and B. were Tenants in Common of ſuch an entire Chattell: *A.* maketh B. his Executor and dyeth. Now hath B. one moyety as Executor, and another as his owne proper, and upon a Judgement againſt him as Executor, that moyety onely which he hath as Executor, muſt be taken in execution; and here may be remembred how in execution of a Judgement, or levying of an Amerciament out of an intire Chattell of more value than the ſumme to be levyed, the whole is to be ſold, and the ſurpluſage above the debt or Amerciament is to be delivered backe to the Owner. For in all this debate, we muſt preſume the thing redeemed by the Executor, to be of better value than the ſumme payd, elſe we may eaſily admit the whole to the Executor. Againe, the Leaſe for yeares, is not ſo intire a thing; I meane the Land let, but that thereof partition may be made; yea inforced by Action betweene joynt-tenants, and Tenants in Common. But here will be objected, the Caſe of redemption by the daughter and heire; who though ſhe have a brother borne after; ſo as now ſhe is no longer heire, yet ſhe ſhall, as the Booke ſaith, retaine the Land redeemed from the Heire as a *Perquiſite* or Purchaſe. As for this (which I will not oppoſe) the Law ſo frameth to the favour of the daughter, becauſe of great miſchiefe to her, if being ſtripped of the reſt of the Inheritance by the birth of a brother, ſhe ſhould alſo loſe that which

her

her money had redeemed, without having any remedy to have her money againe, or any recompence for it; but in the other Caſe, there is no ſuch miſchiefe, for that the Executor may pay himſelfe as hath beene ſhewed.

Now on the other ſide, if the Caſe ſhall be underſtood, that the redemption was by payment after the day, then will I eaſily admit that the property or intereſt, is in the Executor to his owne uſe; or that the Condition, now having no power to reduce it backe, or to operate any thing: It is rather a re-emption, than a redemption, ſince it was at the Will of the Mortgagee, to diſpoſe it at his pleaſure, and any ſtranger, as well as the Executor might thus have redeemed, *viz.* repurchaſed it, therefore onely Equity and not Law in that Caſe can make any part of the value Aſſets in his hands: And ſo alſo I thinke if we ſhould admit in the other Caſe of payment, at the day that the property of the chattell is to the Executor as his owne, and not his Teſtators goods, no part of ſurpluſage of value, can in Law be Aſſets, howſoever in Equity.

Laſtly, if the Executor redeeme by payment at the day with the Teſtators owne money or goods, none will doubt, but that the thing redeemed is in him as Executor, and the money by him paid for redemption is well Adminiſtred, the goods redeemed being of better value. But this way it makes no difference, whether the whole value of the goods redeemed, ſhall be held Aſſets; and the money paid for redemption ſtand drowned therein, or that that ſumme be ſtill adjudged in the hands of the Executor, as Aſſets, and onely the ſurpluſage of the thing redee-

redeemed over and above the ſumme paid for redemption.

Things accrued by Covenant or Aſſumption.

IF *A.* Covenant with B. to make him a Leaſe of ſuch or ſuch Land, by ſuch a day; and B. dyeth before the day, and before any Leaſe made; now muſt *A.* make the Leaſe to the Executor of B. and the Leaſe ſo made to him, ſhall be in him as Executor, and conſequently as Aſſets. This is proved by the Judgement, in the Caſe betweene *Chapman* and *Dalton*. in the late Queenes time. Yet I confeſſe, that it is not expreſſed in the reſolution of this Caſe, that this Leaſe ſhould be Aſſets, but that the Executors ſhould have the Terme as Executors, which implyeth as much in my underſtanding; and the declaration, whereupon the Defendant demurreth, ſetsforth the breach of that Covenant to be in *retardatione executionis teſtament.* ſo as the dammages thereupon recovered, *viz.* 300. and 30. pound were Aſſets, and conſequently alſo, ſhould the terme have beene in view and recompence whereof theſe dammages were given. The like Law, if *A.* aſſume upon good conſideration to deliver in to B. by ſuch a day, twenty quarters of Mault, or ſo many loades of Coales or Wood, or any other Wares or Marchandiſe, and this is not performed in the life of B. but after to his Executor, it ſhall be to him as Executor, and ſhall be Aſſets in his hands, as well as the money recovered in dammages for not performing ſhould have beene.

Plow. Com.

of

Of things accrued by remainder, or increaſe.

IF a Leaſe be made to one for life, the remainder to his Executors for yeares, and he dyeth, this will be Aſſets in the hands of his Executors, though it were never in the Teſtator, as was in the latter end of the late Queenes time, reſolved by three Juſtices, the Lord *Anderſon* onely being of a contrary opinion; and there it was ſaid that *Cranmers* Caſe, wherein the contrary in effect was reſolved, was of little authority, for that there were firſt two Judges againſt two, till after, *Mounſon* changed his opinion, upon a conceite, that there the eſtate was by way of uſe, which could make no difference; like Law where a Leaſe for yeares is by Will bequeathed to *A.* for life, and after to B. who dyeth before *A.* although B. never had his terme in him, ſo as that he could grant or diſpoſe it, yet ſhall it reſt in his Executor, as his goods and be Aſſets. As for a remainder for yeares, ſo in the Teſtator, that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof, though the ſame fell not in poſſeſſion to the Teſtator in his life time, yet no ſcruple nor doubt can be, but that this is Aſſets to the Executor, even whilſt it continues a remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible. Nor much of other nature, to theſe are the Caſes, where the Executor Merchandizing with the goods of his Teſtator, maketh gaine thereof. So if the Sheepe, or other Cattell of the Teſtator doe breed, viz. beare Lambes, Calves, Colts, &c. after the Teſtators death, even theſe which were never in the Teſtator, ſhall yet be-

11. *H.* 6. 35. *per Babington.*

Aſſets, and ſo the Wooll growing upon the Sheepe after the Teſtators death. But there is one Caſe worth the conſideration and worthy of ſome doubt, as I thinke, and that is this. One leaveth to his Executor a Leaſe for yeares of Land, worth twenty pound by yeare, and the Executor keeping this in his owne hands, one yeare after the Teſtators death, doth make thereof thirty pound in cleare gaine above all charges, now whether, as to a Creditor, this whole thirty pound ſhall be Aſſets, or onely twenty pound, and the Caſe ſimply thus put, ſhall be underſtood of an occupying, and manuring without any ſtocke of the Teſtators; and then if the Executor did ſtocke it with his owne Sheepe, or other Cattell, as he muſt have borne the loſſe by rot or death; ſo is it reaſon, that if the manurants prove gainefull, he reape the fruites thereof in recompence of his adventure, and of his induſtry, skill, and good husbandry. But if the Teſtators ſtocke of Sheepe and Cattell were (as of neceſſity, or for the better advantage of the Teſtators eſtate) continued upon the Leaſe Land, then is it reaſon, that the gaine or loſſe whatſoever of them God ſendeth, doe redound to the Teſtators eſtate. Like Law, as I thinke, if an Executor finding, that he cannot inſtantly, after the Teſtators death, let the Leaſe Land neare the value, ſhall therefore buy ſeed-Corne, and hire the plowing, &c. But it may be ſaid, that the Leaſe hath one entire valuation at the firſt, upon the appraiſement. To this I anſwer, firſt, that the value upon the appraiſement is not binding, nor much reſpected at the Common Law; if it be too high, it ſhall not prejudice the Executor; if too low, ſhall not advantage him; But the very

value

value found by Jury, when it comes in queſtion, whether the Executor have fully adminiſtred, or have Aſſets or not, is that which is binding. Next I ſay, that if a long Leaſe come to Executors, of Land worth an hundred pound by yeare, and no ſale is made thereof by the ſpace of a yeare or more, now the terme continuing of the like value, as at firſt, it is no reaſon but this hundred pound raiſed the firſt yeare, ſhould goe towards the payment of debts and Legacies rather than any of them ſhould be unpaid. This thing, I meane the knowledge of them are uſefull two wayes, viz. Firſt, to give light to Executors, to diſcerne what unto them of right pertaines: Next to ſhew unto Creditors and Legatees, what and how farre things ſhall be Aſſets, that is to ſay, goods to enable, charge, and binde Executors to pay debts and Legacies. For whatſoever any of theſe wayes commeth to the Executors from their Teſtator, or is recovered by any of theſe Actions, ſhall be in their hands Aſſets, the Coſt and charges of recovering deducted.

CHAP. VII.

What manner of Intereſt an Executor hath in his Teſtators Goods and Chattels, and how different from the common Intereſt they or others have in their owne proper goods.

THe Intereſt which an Executor hath as Executor in the Goods of his Teſtator is much different from the abſolute, proper, and ordinary Intereſt,

which every one hath in his own proper goods, as may well appeare in and by theſe points, 1. Although if a ſtranger take away theſe Goods, the Action of Treſpaſſe for the Executor, is of generall forme, *Quare bona ſua cepit*, calling them his Goods, whereas a man Outlawed in Debt, &c. or convict or attainted of felony or treaſon, forfeiteth all his owne Goods, yet theſe which he hath as Executor, ſhall not be forfeited. If a Villen be made Executor, his Lord cannot take theſe goods, though he may take all the Villens owne Goods: and for taking ſuch Goods, or for a debt due to the Teſtator, a Villen may ſue his Lord. Nay, if the Executor grant all his Goods, ſome good opinion hath beene, that theſe which he hath as Executor ſhould not paſſe, yea the Lord *Dyer* ſo held in the late Queenes time, with this difference, viz. Where the Grantor is named Executor in the Grantee, there the Goods which he hath as Executor ſhould paſſe, but otherwiſe if he be not named Executor in the Grantee, and that this opinion is probable, will further appeare by that which followeth.

24. E. 3. f. 35.

32. H. 6. 34

Lit. tit. villenage. 41. 42.

10. E. 4. f. 1. Yet 39. H. 6 f. 15. A releaſe of all actions, by an Executor, extincts actions as Executor. But *Frowick* is againſt it in 20. H. 7. Kel. 64.

Secondly, the Executor cannot by Will give or bequeath the Goods he hath as Executor, and if he dye Inteſtate, and Adminiſtration of all his Goods is committed to *I. D.* yet hath he nothing to do with the goods which the Inteſtate had, as Executor to his Teſtator: Thus all his Goods, reacheth not to his Goods as Executor.

See theſe ſo reſolved in *Plow. com.* 525. *ante Bransby & Grantham. P.* 20. *Eliz.*

Thirdly, whereas a mans Goods ſtand liable to the payment of his debts, both in his life-time and after; The goods which a man hath as Executor, are not to be taken in execution for his owne debts either upon a Recognizance Statute

or

or Judgement had against him. And if such a one dye indebted, leaving to his Executor much Goods, which he had as Executor; these are not Assets in his hands, lyable to the payment of his debts, but onely for the payment of the first Testators debts or Legacies. Therefore a *Quo min.* brought by an Executor, shewing that he was not able to pay the Kings debt, because the Defendant detained from him an 100. pound, which he owed him as Executor to *I. S.* was overthrowne, for that it could not be intended, saith the Booke, that the Kings debt could be satisfyed with that which the Plaintiffe should recover, and receive as Executor. Whereas a Woman being possessed of anychattels personal, viz. moveable Goods, all be devested out of her into her Husband by her marriage, so as if he dye, and she overlive, they be not hers againe, but her Husbands Executors, or Administrators, and if she dye, all be the Husbands, without being Executor to his Wife. It is not so of the Goods which she hath as Executor, these still remaine in and to her, if her Husband dye, and if she her selfe dye, for that she hath them as it were in anothers right, viz. as she represents the person of her Testator, her Husband shall not have them; if he be not his Wives Executor, and so Executor to her Testator.

Lastly, whereas the Writ of Trespasse seemes to make no difference betweene ones owne Goods, and those he hath as Executor, that being a possessory Action or suite grounded upon the possession; yet come to an Action of debt, which more tastes and participates of the right, and there are they differenced: for where for my owne debt, when I sue, the Writ saith *debet & detinet*

This may be in his name only out of whose possession the goods were taken

detinet, viz. that the Defendant owes me, and
Co.l.5.f.31. detaines from me that ſumme. Yet when I ſue as Executor, the Writ ſaith not *debet*, he doth owe me, but *detinet* onely, he detaines from me, as admitting that he is not the Debtor to me, though he ſhould pay me; and ſo where I am ſued as Executor, the Writ makes me not a Debtor, but a detainer; Otherwiſe, where in my owne right, I owe and am ſued for a debt. Accordingly, where Judgement in an Action of debt is given againſt one as Executor, it is not generally that the Plaintiffe ſhall recover againſt him, but he ſhall recover of the Goods of the Teſtator, and therefore upon this Judgement no *Capias* lyeth againſt him, to inforce him to pay by Atreſt of his body, becauſe he is not properly debtor; but if after it be returned that he hath waſted the Teſtators Goods, out of which the ſaid debt ſhall be ſatisfyed; Then he having made himſelfe a Debtor, a *Capias ad ſatisfaciendum*, ſhall be awarded againſt him, and then he ſhall be taken in Execution. So alſo in ſome caſes of falſe plea pleaded, for where the Judgement is *de bonis propriis*, the Plaintiffe may have
34.H.6.45. a *Capias ad ſatisfaciendum*, and that Judgement is in divers caſes for the dammages, although not in many for the principall. As for the *Capias* before Judgement, in the meane *proces* againſt an Executor, that is, becauſe of his Contumacy in not appearing upon the former *proces*.

The reaſon of this different intereſt between an Executor and another, or betweene the ſame mans having goods as Executor, and others in his owne right; as alſo of the different manner of ones being indebted as Executor, and otherwiſe

wiſe in his owne right, is well expreſſed by the Lord *Coke*, in *Pinchons* caſe, *viz.* Firſt, that the goods which one hath as Executor, he hath not in his owne right, but in *auter droit*, that is, in the right of another, meaning his Teſtator. Secondly, that Executors are but the Miniſters, and Diſpenſors, or Diſtributors of their Teſtators Goods. *Co. lib. 9. 88. b.* See this alſo *Plow. com. 530. a.*

Of alteration of property in the Executors hands, ſo as ſome goods become his owne, which he had as Executor.

TO this head or Chapter, treating of the difference betweene the Intereſt in Goods, as Executor, and others had meerely in ones owne right, and to his owne uſe, it is not impertinent, to conſider how that which one hath at the firſt as Executor, may be changed in property, and become the Executors owne to his owne uſe, as other his goods, which he had not as Executor. Here let us firſt conſider of ready money left by the Teſtator; for ſince pieces of money, *viz.* ſhillings, groates, pieces, and halfe pieces of gold, cannot be knowne one from the other, it muſt needs follow that theſe comming to an Executor from the Teſtator muſt in ſome ſort be altered in property, ſo as though the Executor ſhall be ſaid to have ſo much in money or value, yet can it not be diſcerned which money in his houſe was his Teſtators, and which his owne. Conſequently the Sheriffe upon the *fieri facias*, for a Creditor, who hath recovered againſt the Executor a debt owing by the Teſtator, cannot take away money in execution as the Teſtators, in my opinion; *Quere* if thereupon a *devaſtavit*

ſhall be returned, or what ſhall be done.

But what if the Teſtator were indebted to the Executor, or if the Executor not having ready money of the Teſtators, or otherwiſe ſhall pay a debt of the Teſtators with his owne money, what ſhall we ſay of the Converſion or alteration of ſome of the goods from being his as Executor, to be his meerely in his owne right? Hereof I have ſhewed elſewhere my conceiving, which is briefly thus. That except either he have in his hands money of the Teſtators, (for of that it is eaſie to make a proportionable change) or unleſſe the ſumme to him owing from his Teſtator, or by him paid for his Teſtator, amount to the full value of all the Teſtators goods in his hands, or doe exceed the ſame, no alteration can be untill ſome election or declaration by the Executor made, which of the goods, not exceeding the debt unto him, he will have to be his owne; For where the Teſtators goods exceed this debt to him, the property of all cannot be changed, and of what part ſhall the Law adjudge the change, till choyſe by the Executor? It is good therefore for him to doe as the Mother Guardian in Soccage, who is to endow her ſelfe, calling her Neighbours, and expreſſing to them which part of the Land ſhe will have for her dower. So let the Executor doe, but let him take heed that his election or declaration exceed not his debt, leſt it be voyd. And that ſuch particular election is to be made, ſeemes to me proved by the Caſe of 21. *E.* 4. *fol.* 21. where the payment of money, and detaining or taking of a Horſe of the Teſtators, is mentioned; But *Choke* there ſayes, this cannot be done without the Ordinaries aſſent. And the Reporter thinkes though

2 *El. Dy.* 185. This divers Bookes affirme, ſect. 20. *H.* 7. 4. & *Kelw. Rep.* 59. & 2. 3. *El. Dy.* 147. 6. *H.* 8 *Dyer. fo.* 2.

Plow. 544. So of a Legacy in money given to the Exe.

See 2. 3. *El. Dyer.* 187.

though the Ordinary doe assent, yet the property shall not be turned into the Executor as his owne.

2. Another alteration is of the profits of a Lease come to the Executors from the Testator; For since no more thereof shall stand in the Executor as Assets then so much onely as exceeds the yearely value according to the resolution in *Hargraves* Case, it must needs follow that the residue of the profits must be the Executor, he paying the rent out of his owne purse, as that Case resolves in consequence, *viz.* that he shall be sued for it in the *debet*, and not in the *detinet* only, as for the rent due before the death of the Testator. Thus though he have the lease as Executor, yet part of the profits are meerely his owne, not as Executor. *Co. l. 3 f. 4.*

And looking backe upon this Case, we may discerne a necessity, sometimes of the Executors paying with his owne money for his Testators debt, as where the Testator being to pay a rent at Michaelmas or our Lady day, dyes a day or two before, or to put it more clearely a day or two after the Feast, not leaving any goods to pay the rent, other then the future profits of the Lease. Here unlesse the Executor will forfeite the Lease, he must lay out of his owne money. Now if in this and other like Cases he could not doe this untill he had under seale, or by act in the Court Spirituall an assent of the Ordinary, it would be an extraordinary trouble to Executors.

I find also *tempore, Hen.* 7. another meane of altering property (to wit) where a *fieri facias* comes to the Sheriffe, to sell, or levy a debt of *20. H. 7. 5. a.*

the

the Teſtators goods, now ſaith the Booke, may the Executor buy theſe goods of the Sheriffe as well as another, and if he doe, the property which he had as Executor ſhall be turned into a property *in jure proprio.*

If an Executor amongſt his Teſtators goods, find and take ſome, not his, and after theſe being claymed by the owner, who left them in the Cuſtody of the Teſtator, the Executor not crediting the claime, ſtill keepes them, and the owner therupon recovers dammages in an action of treſpaſſe, or of *Trover* and *converſum*; now (and ſo in all other like Caſes) are theſe goods become the Treſpaſſors in property, becauſe he hath paid for them; therefore it is not ſtrange, if in like manner an Executor paying out of his owne purſe, for or in liew of the Teſtators goods, have ſo much of them (where no certainety) changed in property and become his owne. This is but put as an inſtance underſtood with the exceptions and cautions precedent.

20. *H.* 7. *Kelw. Ca.* 58

CHAP. VIII.

Of ſome caſes and queſtions betweene the Executor and the Heire.

21. *Hen.* 6. 30. If other goods taken among them he is excuſed. 21. *H.* 7. 25 *Vide l. Intr.* 640. It is ſo pleaded.

THE Executor may in convenient time after the Teſtators death enter into the houſe deſcended to the Heire, for the removing and taking away of the Goods, ſo as the doore be open; or at leaſt the

the key be in the doore: and this I underſtand of the doore of each roome; for although the doore of entrance into Hall and Parlor be open, the Executor cannot by that juſtifie the breaking open of the doore of any Chamber to take goods there, but onely may take thoſe in the roomes which be open; and this is proved, as to me it ſeemes by the Caſe of the cheſt with Evidences, which, ſaith the Booke, the Executor may take and put out the Deedes, delivering them to the Heire, *viz.* the cheſt being unlocked, as I underſtand it. Now a Chamber or other roome within a houſe locked, is an encloſure of better reſpect than a cheſt. But if the goods be not removed within convenient time, the Heire may diſtraine them as *dammage feſant*.

43. E. 3. 24. *Bro.* 145. Makes a *que.* if it be locked.

Plow. Com. 280.

Where the Teſtator recovered Land and dammages, or a Deed and dammages, he dying before Execution, the Heire ſhall have execution, for the Land or Deed, and the Executor for the dammages, but *temp. Edward* the 4. it is ſaid that untill the Heire ſue a *Scir. fac.* the Executor cannot ſue execution for the dammages.

43. *Ed.* 3. 2. 10. *Ed.* 4. 5. 6. Of the Deed Execution firſt

If a Creditor be made Executor by his Debtor, and pay himſelfe part out of the Goods, he cannot ſue the Heire for the reſt, becauſe the debt cannot be apportioned, but otherwiſe, he may, ſaith the Booke: yet *Que.* if he doe take upon him the Executorſhip, and have goods ſufficient to pay all.

12. *H.* 4.

If a debt be recovered againſt one who dyeth before execution ſued, leaving goods ſufficient to ſatisfie: now ſhall not the Land deſcended to the Heire, be charged therewith, nor by like reaſon, any land conveyed after Judgement.

7. *H.* 4. *f.* 31 See *Bro. Ex* 124.

See

Co. l. 3. f. 90 91. To like purpose see more, *Litl. f. 77. b. 2 El. Dy. 281. Plow. com. 291. 21. H. 7. 4.*

See a good difference where land is conveyed, upon condition of payment to the Vendor his Heires or assignes, and he dyeth before the time, and where it is to be paid to the Vendee his Heires or Assignes, and he dyeth; in the first case, payment shall be to the Executors, but not in the other.

What things pertaine to the Heire, and what to the Executor is before shewed. As for *Frowickes* opinion, that where goods be mortgaged upon condition, that if the Heire or Executor pay, &c. here if the Heire make payment, he should have the Goods: I see not how that can be.

A Directory for the following Chapter

A. *All as but one represent the Testators person, and must joyne and be joyned in suite, & e contra.*

B. *Where one alone must answer suite, and how.*

C. *When they differ in Plea, the best shall be taken, but one may confesse alone.*

D. *One as well as all, hath, may give assent or release the whole.*

E. *One cannot give nor release to another, nor divide.*

F. *The possession of one is the possession of all, to what purpose.*

G. *If the survivor dye Intestate, the Testator is Intestate, though some other Executor left an Executor.*

H. *Included in the person of the Testator, and represents*

preſents it. Is his Aſſignee; all one,& è contra.

I. *VVhat change by death of the Teſtator, tou ching proceeding in ſuite.*

K. *Proceed to or in Execution, where without* Scire Fac.

M. *VVhether the Executor ſtand in his owne quality or his Teſtators.*

N. *VVhere one alone may ſue.*

O. *In ſuite for them ſuch as will not joyne ſhall be ſevered, and the other may ſue and proſecute alone*: conſequents inde.

P. *Death of one Executor, Plaintiffe or Defendant; where abates Writ.*

CHAP. IX.

How Executors ſtand betweene themſelves, and in repreſentation of, or relation to the Teſtator, As his Aſſignee or Deputy, or as the ſame perſon with him, and where, and to what purpoſe, as other perſons.

FIrſt, all of them doe repreſent the perſon of the Teſtator, and therefore muſt they all joyne in ſuite againſt others, and in ſuite by others they muſt be all made defendants, or at leaſt ſo many of them as doe Adminiſter: for though the Executors themſelves muſt take notice by the Will, how many Executors be, and muſt frame their ſuite accordingly; Creditors and ſtrangers need not take notice of any more then doe Adminiſter, and Execute the Office of Executors. For this reaſon, as I take it, in the time of King Edward

Are as one perſon; therefore cannot plead ſeverall pleas in abatement. 37. H. 6. 17. 9. H. 6. f. 44. 38. E. 3. 9. Bro. Ex. 13. Bro. Ex. 30. 21.

Therefore one Executor ſued, if he plead that there is another Executor not ſued, muſt plead that he did Adminiſter. 9. H. 6. 44. Bro. 13. 33. H. 6. 38. Bro. 20.

ward the third, where two Executors were of a terme, and the reversion was granted by Fine, mentioning but one termor, and thereupon a *Quid juris clamat*, accordingly brought against that one Executor, this was held good enough, though the other Executor was not named in the Suite; belike, because that one (who indeed was the Testators Wife) did onely occupy the Land, and take the profits thereof; for else since all the Executors doe represent the Testators person, all must have beene named. Therefore did the Judges resolve in the time of *Henry* the 4. that where a Lessee for yeares made two Executors, and one of them was distrayned by the Lord for Rent, who avowed upon the Lessor, that Executor should have aide of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator, as one person (for so speakes the Parliament) It was enacted in time of *Edward* the 3. that the Executors, though never so many, shall have but one essoyne, neither before appearance nor after, because their Testator whose person they represent, could have had no more.

32. *E.* 3. *quid jur. clam.* 5.

13. *H.* 4. *Aid.* 186.

A

9. *Ed.* 3. c. 3. A

B

But not if he appeare at the summons. 1. *E.* 4. 1. 14. *H.* 4. *f.* 1. 1. But the plaintiff multiplicate against all, he need not but he may admit another to appeare and plead after. 7. *H.* 4. 12.

It is further also enacted by the said Statute, that where two or three Executors or more be, they being sued in an action of debt, though all doe not appeare; yet such one of them or more as doe, or doth appeare at the *Graunde distresse*, shall answer alone without his companions. And this Statute hath beene taken by equity in three respects.

First, touching the persons: that it shall extend, not to Executors onely, but also to Execu-

tors

tors of Executors, yea, to Administrators also, though the Statute speake onely of Executors.

Secondly, touching the actions; whereas the Statute speakes onely of the Action of debt, it is taken by equity to extend to other actions, as the Writ *de rationabili parte bonorum*, and *detinue*, yet perhaps, this latter Action will be said not to be maintaineable against Executors, for their Testators act, but for their owne onely; But we yet are not come so farre as to determine what is maintaineable; but whether before all the Executors doe appeare, he, or they which have appeared, shall be put to answer; and so to bring it to *decision*; whether the Action be maintaineable, or not. I thinke also that in the action of Covenant, and all other actions against Executors, as Executors, he which appeareth, must answer without his companions, though the greater opinion in the *Quadragesimes* were contrary touching the action of Covenant. But as for the *subpœna* against Executors, which is to make them to answer to a suite in equity; that hath beene *temp. E. 4.* taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the Kings Bench: as was held in the same Kings time, except all the Executors, making up the whole representative body of the Testator, be in the custody of the Marshall, one or more of them who are there shall not be inforced to answer; and so was it also lately held in the Kings Bench, where Master Justice *Houghton* gave an excellent reason, this case is out of the said Statute, *viz.* for that this Writ doth not mention any debt, nor name the Defendants Executors.

Thirdly, and lastly, that Statute is extended by

But Proces must be continued against all. 7. *H.* 6. 35. Executors of Executors by equity. 30. *H.* 6. 45. *Bro. Exec.* 99. 28. *H.* 6. *f.* 4 14. *H.* 4. 23 24. So negatively. 21. *H.* 6 *f.* 1 28. *H.* 8 *f.* 4. 3. *H.* 6. 35 a 39. *E.* 3. 5. There it is not meerely as Executors, it is out of the Statute. 11. *H.* 4. 63. As if in *det. & det.* *Cont.* 47. *E.* 3. 22. So. 7. *E.* 4. 20. 21. 3. *H.* 4. 20. *In fac. fac.* upon a pardon by defendant outlawed at their suite. 47. *E.* 3. 22. Quere *Ennold.* in the affirmative. 8. *E.* 4. 5. 9. *E.* 4. 12. 13. B 20. *vel.* 22. *Jac. regis.*

B by equity to other Writs or Proces; for where the Statute ſpeakes onely of the Grand diſtreſſe,
2.*E.*4.1. 40.*E.*3.1. and the Executors appearing thereupon; It hath beene many times ruled, that when he or they appeare upon the Attatchment, *Capias*, or *Exigent*, anſwere muſt be, though the reſt appeare not; for ſo the word *Diſtreſſe* is taken for all compulſary meanes or enforcement of appearance. But where the Statute reacheth not, *viz.* when the Proces is determined againſt one or more, as by Outlawry, &c. there the reſt muſt anſwer by the rules of the Common Law; except it be in the caſe of Husband and Wife Executor, for there the Wife cannot anſwer without her Husband, nor doubtleſſe can he without her, where ſhe and not he is Executor; but where both be Executors, there he may anſwer without her, but not ſhe without him. When Executors as Defendants have appeared, if any one of them will confeſſe the Action, this bindes and concludes the reſt; but if one will plead one plea, and the other another, that ſay ſome, ſhall be received which is beſt for the Teſtators ſtate; ſo where they ſue, ſuch as will not proſecute, ſhall be ſevered, and the reſt without them may proceed; and in like manner where they pray to be received to defend their terme, and one of them after makes default; it ſhall not be the default of all, but the reſt, or he, if it be but one who appeares ſhall be received to uphold the defence of the terme.

B 11.*H.*4.63. C Or if but one appeare, 28.*H.*6.*f.*364. judgement againſt all. See 9.*E.*4. 12, 13, 14. Where B. who is not Executor is joyntly ſued with *A.* and *B* confeſſeth. 21.*H.*7.25. Yet 7.*E.*4. 7. They may ſever in pleas not dilatory. C 7.*H.*6.*f.*6. *per Cottesmore.* If they recover and one of the prayes a

Thirdly, ſo where they plead a releaſe to the

cap. ad. ſat. and the other a *Fieri fac.* the firſt as beſt ſhall be granted. 3.*H.*4.10.*Bro.*44. So where the defendant Outlawed at the ſuit of two Executors, and upon the *Sci. fac.* after his pardon but one appeares, 21.*H.*7.25. D 9.*E.*4.12.14.

Teſtator

Teſtator or themſelves, one after making default, this ſhall not be, nor make a totall default in the Executors, to induce a judgement or condemnation againſt them. Yet in truth each Executor hath the whole of the Teſtators Goods and Chattells, be they Reall or Perſonall, and each may ſell or give the whole. One of them cannot give nor releaſe to the other his Intereſt, and if he doe, it is voyd, and he who releaſeth ſhall ſtill have as much intereſt, as he to whom he releaſed, becauſe each had the whole before, upon this reaſon long ſince, where one of the two Executors releaſed but his part of a debt, it was held that the whole was diſcharged: and ſo if one Executor grant his part of the Teſtators Goods, all paſſeth, and nothing is left to the other, for that each hath the whole, and there be no parts or moyeties, betweene Executors. Therefore, alſo though a leaſe for a thouſand yeares, of a thouſand acres of Land come to two Executors or more, no partition or diviſion can be made betweene them, becauſe it is not betweene them, as betweene Joynt Leſſees of Land, where each hath but a moyety in Intereſt, though poſſeſſion of or through the whole. Amidſt Executors, each hath the whole, and therefore if he grant his part he grants the whole. But one Executor may demiſe or grant the moyety of the Land for the whole terme, and ſo may the other doe, and this way they may ſettle in friends or others truſted for them, a moyety for each; either in ſeverall or undivided; but one of them cannot make a leaſe to the other of any part, for he had the whole, nor can one ſue the other as Executor, yet if the Teſtator deviſe to one of his Executors, all his goods, after ſuch debts and Legacyes ſatisfyed,

21.E.3.13. 27.H.8.21 22.

D E

C

If an horſe come to foure Executors, each hath a horſe, and yet all foure have but one.

E D

E

6.H.7.5.

there after thoſe ſatisfyed, that Executor may take the Goods and maintaine an Action of Treſpaſſe againſt the other Executor, if he take them from him, and conſequently an Action of *detinue*, for keeping or detaining them: but this is as Legatee, his owne aſſent perfecting the Legacy.

F The poſſeſſion of one Executor is the poſſeſſion of all the reſt; ſo, as if one appearing to a Sute, and the other making default, in whoſe hands al the goods be which are not adminiſtred, if, I ſay, here he that appeares, pleades that he hath nothing in his hands, this ſhall be found againſt him; for whatſoever any of the co-executors hath, he alſo hath, and is in his poſſeſſion, and ſo ſhall the Creditor recover, and have judgement to be ſatisfyed out of the Teſtators goods, as in his hands. And therefore if goods be taken from one, all may maintaine an Action of Treſpaſſe thereupon; for the poſſeſſion of one, is the poſſeſſion of all. But the poſſeſſion of one ſhall not be ſo the poſſeſſion of all, as to charge the others owne goods, whereof more elſewhere.

14 H.4 12 Bro. 12.

F All muſt ſue, 19. H. 6 65. cont. 24 E. 3. 40. & 42. E. 3. 26 It may be in his name onely from whom taken, nor need he be named Executor. Bro. Ex. 30. 39. H. 6. 45.

Where two Executors be made, the one making a Will and Executors, and dying; if the other dye after Inteſtate; now ſhall not the Executor of him who firſt dyed, be Executor to the firſt Teſtator, but he is dead Inteſtate, becauſe the ſurviving Executor is ſo dead; and in him the Executorſhip was wholly, and ſoly ſetled by the death of his fellow before him: So Adminiſtration, *de bonis non admin.* ſhall be committed.

F G 34. H. 8. Bro Ex. 49. 39. H. 6. 45.

The Executors, or Executor, if but one, ſo repreſents the perſon of his Teſtator, that he is in Law

Law his Aſſignee by the very making of him Executor; ſo as if one covenant to make a Leaſe to *I.S.* and his Aſſignes by ſuch a time, and *I.S.* dyeth before that time, and before the Leaſe made, now muſt the Leaſe be made to his Executors as his Aſſignee, repreſenting his perſon; ſo alſo in a condition to pay to the Feoffor or his Aſſignee, yet a Leaſe to *A.* and his Aſſignes during the life of *B.* ſhall not goe to the Executors of *A.* So where in a generall pardon by Parliament, there is an exception of perſons outlawed after judgement, the perſon ſo out-lawed, ſhall ſatisfy the Creditor, who hath out-lawed him. If the Out-law dye before this done, his Executor as repreſenting his perſon, may make ſatisfaction, and ſo make the benefit of the pardon to extend to his Teſtator, for ſaving his goods, as if himſelfe had ſatisfyed his Creditor, though he left him unſatisfyed, when he left the world, *& diem obiit extremum.* Yet where *A.* ſold Land to *B.* upon *Proviſo*, that if he payed to *B.* his Heires, or Aſſignes, &c. *B.* dyed, *A.* payed at the day to his Executor, and it was doubted that it was not good, for the word Aſſignee could not reach to him being no Aſſignee of the Land: and where the Executor brought an Action of account upon a receipt by the hands of the Teſtator; the Defendant could not be admitted to wage his Law; for that this was held a receipt, *per autermains*; yet it is cleare, that if one by Bond or Covenant tye himſelfe to pay ſuch a ſumme at ſuch a day, not mentioning his Executor at all; yet is the Executor bound, as included

Co. lib. 5. f. 97. H *Chapman & Dalton's caſe. Plow.*

Sir *Edward Phittons* caſe, *Co. lib. a. f. 80.*

A So where the ſtat. of *W. 1.* gives time for proofe to him whoſe goods were wreſted. His Executors may doe it, if he dye before the time. *Co. l. 5. 107. b. Co. lib. 6. f. 80.* Alſo Executors ſhall have reſtitution of ſtolne goods, and a Writ of Error; yet the Statute

ſpeakes but of the party. H 2. *El. Dy. 180. Contr.* where to pay to *A.* the Feoffer his Heire or Aſſigne. *Co. lib. 5. f. f. 97.* 2. *El. Dy. 183.*

in the name of person of the Testator. And where the Statute 23. of *Henry* the eight, gives the Writ of attaint (in the course there mentioned) against the party that had judgement, it lyeth against his Executors if he be dead; but thereof another reason is given, where a man was bound, that he would not sue upon such a Bond, and he dyed, and his Executor sued; this was held to be no forfeiture of the Bond. So where one was bound to pay ten pound within a moneth after request made to him, and he dyed before request; it sufficed not to make it to the Executor, as *Manwood* said. It was likewise held that the warrant of Attorney put in for the Plaintiffe in debt, it sufficeth not for his Executor to bring a *Scire Fac.* upon the judgement. And if Executors sue execution upon a Statute in the name of a Conusee, as if he were alive, this is voyd, and they may sue out new extent, and this they may doe without any *Scire facias*, as well as the Conusee might, if he had beene alive. But by *Hussey* Justice, if the Conusor in a Statute staple be returned dead by the Sheriffe upon the extent; a *Scire fac.* must be sued out before extent proceed; and upon a judgement had, if the recoverer dye before execution, his Executor cannot as himselfe might, sue out execution without a *sci fac.* as is there said. Yet if after a *Capias ad sat:* awarded, the Plaintiffe dye before it be executed, the Sheriffe may proceed to the taking of the party, and is not subject to any action of false imprisonment, nay, if he suffer him to escape he is chargeable, as *temp. Elizabeth* it was resolved upon the motion of *Anderson*; but withall it was held that reliefe might be by *Audita querela*. Like resolution was in the

3. *Eliz. Dy.* 201.

H 27. *H.* 8. 16

M. 15. & 16. *El.*

I 34. *El. vel circite Titherley & Lexeor. Walsh in. ba. reg.*

I 36. *H.* 8. *Bro. stat. Merchant.* 43.

K 2. *R.* 3. 8.

H I 15. *H.* 7. 14

F 15. *E.* 3. *Respond.* 1. *con.* upon a stat. Merchant.

K *Conte. No. br.* 267. upon a Recog.

I

H 30. *El. tot.* 31. *in. ba. reg*

the Kings Bench, after ſome doubt by *VVray*, and the other Judges, where the Defendant dyed after a *Fieri fac.* awarded, and before it was executed, that the Sheriffe might proceed upon the Goods in the hands of the Executors.

But if the Defendant in an Action of debt, upon a Bond plead a tender at the time and place of payment, and tenders the money in Court, where it reſts and then he dyes, now ſhall not the Plaintiffe have this money, becauſe the property thereof is changed, and become the Executors, as was held in the Common Pleas, but he is put to a new ſuite againſt the Executor. I

Yet where judgement is once given in a Writ of Partition, for a termer, or in a Writ of Account, if the Plaintiffe dye before the ſecond judgement needfull in both caſes, the Executor is not put to a new ſuite; but may proceed by *ſci. fac.* upon the former judgement, as the Lord *Anderſon* held upon the motion of *Fenner* Serjeant. P 32. *El. vel circite.* I *Paſ. 28. Eli.* H

Though before we found the Executor not in points penall, all one with the Teſtator, yet in point beneficiall, the Teſtator includes him in ſome caſes, as where an Abbot granted to his Leſſee to take Eſtovers in another ground, it was held that his Executor though not named ſhould enjoy this, during the terme as well as himſelfe ſhould have done. And whereas the Stat. 23. of *H.* the 8. gives coſts to a Defendant againſt a Plaintiffe, ſuing for a wrong, or breach of promiſe, or the like, done to the Plaintiffe againſt whom it paſſeth by verdict or nonſuit; it hath beene reſolved that an Executor ſuing upon ſuch wrong, or breach of contract to his Teſtator made, ſhould not pay coſts, becauſe he is another *Trin. 36. El. in ba. reg.* H M

other perſon than the Teſtator; and ſo is it uſuall in experience. But if in ſuch ſuite, the Attorney of the Executor miſ-behave himſelfe towards him, and for this the Executor ſueth him, here if it paſſe againſt him in manner as aforeſaid, he ſhall pay coſts, becauſe this was a ſuite for a wrong done to himſelfe.

Pa.41.Eli. in comba.

If *A.* recover a debt as Executor of *I.* S. and makes *B.* his Executor, and dye before execution ſued, *B.* is not put to new ſuite, but may have execution upon that Judgement: But if *A.* or *B.* dyed Inteſtate, now could none as Adminiſtrator to either of them, nor as Adminiſtrator of *I.S.* have execution of this Judgement; for the former hath no intereſt in any thing pertaining to *I.* S. and the latter commeth to title above the judgement, *viz.* as immediate Adminiſtrator to *I.* S. who is now dead inteſtate: and derives no title from the Executor, who recovered.

I

H 28.H.8

If a Conuſee have a Certificate into the Chancery, upon a Statute, and then dyes, before extent taken out, his Executor is put to a new Certificate, and for obtaining of it, muſt make Affidavit, that no extent hath yet beene taken out.

2.El.Dy. 180.

I

If an Alien joyne with his Wife, who is Executor in a ſuite for debt, and it commeth to Iſſue, he ſhall not have tryall *per medietatem alienig.* or *Linguæ* as ſhould be if he otherwiſe were party to a tryall, as was held in the caſe of Doctor *Iulio.* Yet if a Noble man ſue as Executor to another, not noble, he ſhall for his nonſuite be amerced five pound, as if he ſued in his owne right, as was conceived 21. E.4. 77. By the ſame rule and reaſon doubtleſſe a Noble man ſued as Executor, ſhall not be arreſted, nor ſhall any *Capi-*

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as

as be awarded againſt him for not appearing. And if any triall ſhall be of any iſſue, there ſhall be two Knights of the Jury, as in other caſes where a Peere is party. Likewiſe where the Wife is to have her conveniens apparell, whereof the Executor muſt not bereave her; If ſhe be a noble Woman, it ſhall be anſwerable to her degree.

If one Executor onely ſell Goods of the Teſtator, he alone may maintaine an Action of debt for the money. So if goods be taken out of the poſſeſſion of one Executor, he alone may maintaine an Action, and that without naming himſelfe Executor. A 38.E.3.f.9. N

Some touch hath beene before of Summons, and ſeverance, whereabout be this added. If one Executor will not, or cannot joyne in ſuite with the other, ſo as he is ſummoned and ſevered, now by his death, after the ſuite is not abated, *16.Ed.2.Fitzh.*111. yet if he live till judgment, he may ſue execution, ſay other Bookes, 13.*Ed.* 3.*Fitzh.Exec.*9.11. *R.2.Priviledge* 2. yet *Que.* of that, for he cannot acknowledge ſatisfaction, as hath beene ſince reſolved, *Mich.*14. *&*. 15. *Eliz.Dy.*319. And the reaſon thereof being becauſe he is no party to the judgement, by the ſame reaſon can he not ſue execution upon it, for how can he have execution for whom there is no judgement given, now the recovery is onely in the name of the other Executor; yea, by the ſaid laſt Booke, it ſeemes that after judgement had, he cannot releaſe the debt, becauſe it is now altered in nature, and turned in *rem judicatam*, though at any time before judgement he might have releaſed it, as both that laſt Booke ſaith, and the two precedent *temp. Ed* 3.*Rich.*2. yea in an Action of account, after judgment had, P O 3.*H.*7 1.& 5.*E.*2. *Fitz.bre.* 802. *Conte.* 38.*E.*3 13. & 20.*E.*3. *tit. account.* 78.

that the Defendant ſhall account, the releaſe of him ſevered, is a good diſcharge to the Defendant, as was reſolved 48. *Ed.* 3. 14. 15. but this is not a plenary judgement, for nothing is recovered thereby, but another judgement is to be had after the account, which may be againſt the Plaintiffe, ſo as this releaſe came before any debt or duty adjudged. What if the Defendant be had in execution at the ſuite of the Executor, who proſecutes it, and eſcapeth; whether may the ſevered Executor diſcharge the Sheriffe or Jaylor by a Releaſe, I thinke he may not.

P By that above it is plaine, that if any one of the Executors Plaintiffes dye, the Writ is abated, onely where he ſo dying was before ſevered; opinions have beene different, as above appeares. So alſo is it, if one of the Defendants Executors dye. Yea, if the Plaintiffe Creditor ſue *A. B.* and *C.* as Executors, where onely *A.* and *B.* are Executors, there by the death of *C.* the Writ abates, or falles to the ground, yet *A.* and *B.* as I thinke might have pleaded in abatement, that they onely were Executors, traverſing that *C.* was not Executor, but the Booke doth not ſo reſolve. See, 46. *E.* 3. *f.* 9, 10.

2. *H.* 4. *f.* 14

P

9. *E.* 4. 12. *Bro.* 34.

As *A.* and *B.* above might admit that Writ againſt them and *C.* So if the Writ or Sute had beene againſt *A.* onely, and he ſo admit it, not plead ng in abatement, the recovery againſt him alone is good. 9. *E* 4. 12.

A

21. *H.* 6. 30

One that is Out-lawed or attainted in his own perſon, may yet ſue as Executor, becauſe this ſute is in anothers right, *viz.* the Teſtators: But he that is excommunicate cannot proceed in ſute as Executor, becauſe none can converſe with him with-

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21. *E.* 4. 49

69. 42. *E.* 3

13. 14. *H.* 6. 14, 15.

without being excommunicate, as a Booke sayes. Yet doth not this excommunication pleaded, abate or overthrow the sute, but make that the Defendant may stay from answering his suite, untill the Plaintiffe be absolved and discharged from this excommunication. 3. H. 6. 40. Litt. l. 44. Co. l. 81. 69. 11. R. 2. Excom. 25.

CHAP. X.

Of the Possession of Executors, or their actuall Having.

1. *What shall be said, so to come to their hands, as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to Executors, and being come shall be Assets in their hands. Now for that it is said in *Reedes* Case that an Executor shall not be charged with, or in respect of any other goods than those which come to his hands after his taking upon him the charge of the Executorship; Let us now examine what shall be said, and accounted such a full and compleate comming to the hands of Executors, as shall make them within the reach and charge of Creditors, and Legatees, *viz.* For the payment of debts and Legacies. As touching debts due to the Testator, it hath before beene shewed, that untill Judgment and execution had, they be not Assets in the Executors hands. Now then, as touching other goods or chattels possessory, Co. lib. 5.

ſory, which are of two kindes, *viz.* reall, and perſonall: Let us put the caſe thus. The Teſtator at the time of his death hath a flocke of Sheepe in *Cumberland*, Corne in the Barnes in *Cornewall*, Bullockes in *Wales*, fat Oxen in *Buckſhire*; Money, Houſhold-ſtuffe, and Plate in *London*, a Leaſe for yeares in *Norfolke*, and his Executor dwelt at *Coventry*, *viz.* farre from all theſe places, what kinde of poſſeſſion ſhall the Law judge this Executor to have in every of theſe, inſtantly upon the Teſtators death, and before he come where any of the things be, either to ſee or ſeize upon them? In all the particulars above mentioned, the Law is all one, except the Caſe of the Leaſe for yeares, which if it be of Land (as is moſt uſuall) then becauſe it is a ſetled and immoveable thing; the Law doth not reach to it the foote of the Executor, to put him in actuall poſſeſſion, for *Poſſeſſio eſt quaſi pedis poſitio*) untill himſelfe, or ſome for him doe actually enter thereupon. Nor indeed need the Law helpe or ſupply the want of actuall poſſeſſion in this Caſe, as in the caſe of moveables: ſince Land cannot be carryed away as goods may, and therefore is not ſubject to purloyning or imbeſilment as moveables are. But if the Leaſe for yeares, were of Tithes, the Executor, though in never ſo remote a place from them, ſhall be inſtantly upon the ſetting out thereof in actuall poſſeſſion of them, ſo as he may maintaine an Action of Treſpaſſe againſt any ſtranger which ſhall take the Tythes ſet out, though he, nor any for him did ever before poſſeſſe any of the ſaid Tithes, or came neere unto them. But if the caſe were of a Leaſe for yeares of a Rectory conſiſting not only of Tithes, but alſo of Gleabe Lands, into which entry

Perk. 5. b.

45. *E.* 3. 17.
21. *H.* 6. 43

entry may be made, as alſo Livery of ſeiſin in it, then it may perhaps be ſome queſtion, whether ſuch an actuall poſſeſſion in Tithes, ſhall be given by the Law to an Executor, neglecting to enter, or not entring into the Gleabe Land. And ſo I leave the conſideration of Chattells Reall.

Touching things Perſonall, in which the Executor hath ſuch an actuall poſſeſſion, preſently upon the Teſtators death, as that he may maintaine an Action of Treſpaſſe againſt any ſtranger taking them away or ſpoyling them, though he nor any for him ever came neere them: whether yet this ſhall be ſuch a poſſeſſion in the Executors, and ſuch a comming of theſe goods to their hands, as to charge them with payment of debts and Legacies, yea to make their owne Goods lyable inſtead of theſe, is a point worthy of conſideration.

9.E.4.50. Plow.com. 281. 32. H.6.13.14. H.8.22.

And doubtleſſe, this throughly ſifted, will prove a Caſe miſchievous, whither way ſoever the Law be taken, for firſt it muſt be admitted that without the Executors laying his hands actually and particularly upon the Goods in the Houſe or Fields of the Teſtator, whether the Executor hath reſorted, he ſhall be ſaid ſo in poſſeſſion, as to ſtand lyable unto the Creditors, ſo farre as they extend in value, though after others purloyne or imbeſill them. Now then if diſtance of place ſhall make difference, where ſhall be the bound and limit of that diſtance? and if the Executor may come at a ſtrangers taking, or poſſeſſing of the Goods, it is miſchievous to Creditors.

On the other ſide, if it ſhall be laid upon the Executors to anſwer for all the goods whereof the

the Teſtator dyed poſſeſſed, it will be miſchievous for them, and deterre them from taking Executorſhip upon them, ſince much purloyning, may be even of money, Jewells, and Goods by Servants and others, about the Teſtator, or where theſe things be. I thinke therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the Executors, they be prevented by others, of laying hold on the Teſtators Goods, ſo as that they may diſpoſe of them; eſpecially, if it cannot be knowne by whom they are ſo purloyned, and imbeſilled, or if they be perſons fled, or inſolvent, that then they ſhall not ſtand upon their ſcore, as Goods come to their hands, in reſpect whereof, Creditors or Legatees ſhall draw ſo much from them, even out of their owne Goods, as in other caſes, where they have, no ſuch excuſe ſhall be.

33.*H.*6.c.1 And of this mind I the rather am, becauſe I find the whole Realme in Parliament, taking notice of ſuch prevention of Executors, comming to the Goods of their Teſtator, by the wrongfull act and imbeſilment of others, without any default in themſelves. And in this Caſe the Parliament hath given ſpeciall remedy, *viz.* that Writs ſhall be directed to Sheriffes, to make open Proclamation for the appearance of the parties delinquent in the Kings Bench, at the day limitted, and in default thereof they ſhall be attainted there of felony, the Writ being returned executed, *viz.* Proclamation made. But note that this Proclamation is to be made two Market dayes, within twelve dayes next after the Delivery of the Writ, and the laſt Proclamation muſt be fifteene dayes before the day of appearance

rance. And theſe Proclamations muſt be made in ſuch Cities, Burrowes, or Places (ſaith the Statute) not expreſſing what is meant by the word ſuch, and therefore, meaning doubtleſſe thoſe in which the act or offence is committed. So that if the fact be not committed within the limits of ſome City, Burrow, or Market Towne, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market dayes, in the place where, &c. Now beſides other Places, even ſome Burrowes, *viz.* Townes, ſending Burgeſſes to the Parliament, have no Markets, and ſo are no places within the Act. Alſo two Executors muſt require this Writ, therefore where there is but one Executor, no reliefe is given by this Law, for it is penall, making felony, and therefore ſhall not be extended by equity beyond the Words. Laſtly, it extends but to the Executors of Lords and Perſons of good degree, and onely to the Treſpaſſing ſervants of ſuch Perſons, not to other ſtrangers, purloyning the Goods. But now who ſhall be ſaid to be Perſons of good degree, not being Lords, I will not much labour to decide, the rather becauſe I have not heard, nor read, to my remembrance, of any Action brought upon this Statute, but I thinke that good degree muſt ſtay either at a Knight, being the loweſt dignity, or at a Gentleman, being a degree of Worſhip, as elſewhere is ſhewed, and not ſtoope any lower.

And the ſaid Statute ſeemes in ſome ſort to imply an opinion this way, which I incline, in that it expreſſeth this purloyning to be an impediment of the execution of the Will, whereas if the Executors ſhall anſwer and make good to Creditors and Legatees, out of their owne ſtate

and

and goods, for these imbesilled, the execution of the Will is not hindered, but the Executors are damnifyed in their owne private value, yet it may be said on the other side, that some things given in *specie* by the Will, such a peece of Plate, such a Furniture of a Bed or Chamber, such a Jewell may be purloyned, so that the Legatees can never have them, and consequently the execution of the Will be hindered, though some recompence be made by the Executors: but how these Legatees shall recover recompence in such cases; for that Legacies are not to be recovered by Suite at the Common Law, I must leave to the Professors of the Common or civil Law to inform. But if the Executor be of secret assent to this imbesilment, wherof even the forbearance to sue for the recovery of the things, or the value of them in dammages, if knowne where they, or the imbesillers be, is a shrewd evidence, or proofe. Then shall the Executor be adjudged an haver of them, and so stand charged as having them, for *Pro possessore habetur qui dolo desiit possidere.* And if in any Case the taker by prevention from the Executor before his knowledge perhaps, of the Testators death, or at least, before his possibility of repaire to the place where the goods were, to put them in sure Custody; if I say, such actor keepe these goods from falling upon the shoulders of the Executor, they shall surely fall upon himselfe, and make him chargeable at the Creditors suite, as an Executor of his own wrong.

Of Goods lost by, or gotten from Executors.

But put we the case (for thereunto shall be our next step) that Goods come fully into Executors

cutors poſſeſſion and hands, but be againe loſt or gotten from them without any default in them; ſhall they yet ſtand anſwerable out of their owne Eſtates for them? Surely hereabout two diſtinctions muſt be made as I take it.

The firſt whereof I derive from our learning touching eſcapes of perſons taken in Execution, and impriſoned, if ſuch be reſcued by Alien enemies, the Sheriffe or Gaoler ſhall not anſwer out of his owne Goods for this debt; otherwiſe, if it be done by Subjects, againſt whom remedy is to be had by the courſe of Juſtice: and ſo ſhould I thinke it to be touching Executors, *viz.* that if enemies landing (as neere the Sea Coaſt may eaſily, and often happen) ſhall take away Cattell, or goods from an Executor, hereby he ſhall be excuſed, contrariwiſe ordinarily, if the ereption or direption, be by Subjects knowne and actionable. Another difference I ſhall thinke may probably be taken from the rules of our learning, touching Bailement. If *A.* deliver goods to *B.* to keepe as his own, or generaly, *viz.* without any ſpeciall undertaking by B. to keepe them ſafely, and without any money or other valuable conſideration, given for the ſafe cuſtody; Here, if B. be robbed of them, he ſhall not make ſatisfaction to *A* for them; and ſo if they be ſtolne from a Servant or Factor. But if they be taken away by a knowne Treſpaſſer, not felonioully, ſome opinion hath beene, that the Keeper ſhall make recompence, becauſe he hath remedy for recompence, or ſatisfaction from the Treſpaſſer, yet of this latter I ſhould doubt, becauſe *A.* himſelfe as well as B. may have this Action for dammages againſt the Treſpaſſer. Now an Executor is of the nature of ſuch one having the cuſtody

33. H. 6. 1.
16. E. 4. 2. 3
7. Eliz. Dy. 241.

Vide 29. Aſſ. p. 28. 8. E. 2. Fitz. Dona. 59. 9. E 4. 90. 13. H. 7. 4. Coli. 4. f. 83. 84.

In cuſtodia ſua exiſt.

ſtody of another mans Goods, and I have ſeene in a Manuſcript entire, the Writ of Treſpaſſer by the Executor, expreſſing goods of the Teſtator, in the Cuſtody of the Executor to be taken from him; therefore me thinkes he ſhould no otherwiſe be charged than B. to whom goods were, as above is ſaid, delivered to be kept. For the Executor haply ſhall have no benefit nor advantage by the Executorſhip, all the goods not ſufficing perhaps to pay debts, and Legacyes, which is the ſtare we moſt thinke of, *viz.* where goods want to pay debts, and Legacies, for where there wants not, the queſtion need not be made. Yet a Servant or Factor, who hath wages for his ſervice, is not thereby made lyable to ſatisfie for things in his cuſtody ſtolne, becauſe he hath not for this particular cuſtody, any compenſation, ſo of an Executor, if perhaps benefit might accrue to him by the Executorſhip, as haply the diſcharge of a debt owing by himſelfe, &c. Other Caſes there be, wherein the Executor will ſtand more clearely diſcharged. As if the Teſtator left a Leaſe for yeares, ſtate, by extent, wardſhip, or other Goods whereto he had but a defeſible title, and they be evicted after his death. So if he left a ſhip at the Sea with much goods and Merchandiſes, which are drowned in the returne, never arriving in ſafety.

So alſo if he left a flocke of Sheepe, tainted with the rot, which dye ſhortly after him, in none of theſe three Caſes doubtleſſe ſhall the loſſe fall upon the Executor. But to put a Caſe of more doubt, what if a Leaſe for yeares come to an Executor, ſubject to a Condition for payment of Rent, or a ſumme in groſſe, and the Executor failes in payment, whether ſhall this loſſe fall upon

on the Executor, to be made good to Creditors, or Legatees out of his owne ſubſtance, or not? To this I muſt anſwer by this diſtinction, *viz.* If the Executor had taken the profits of this Land ſo long as to furniſh him with money for this payment, or if he had other goods of his Teſtators in his hands to ſupply the payment, then is it his default that the money is not payed, and he muſt beare the ſmart thereof; otherwiſe not, for he is not bound to make payment out of his owne Goods, yet is he a ſullen and unkind Executor who will not ſo doe, when as he may repay and ſatisfie himſelfe by the profits thereof after. Like Law if the Executor ſuffer a bond of a hundred pound to be forfeit, for not paying of fifty pound, having ſufficient in his hands. So alſo of a Recognizance, Statute, or Judgement, defeaſanzed upon payment of a leſſe Summe; yea, I leſſe doubt of all theſe Caſes, than of the forfeiture of the Leaſe for yeares; for haply the Executor had time to have ſold the Leaſe, and made money thereof, towards the payment of Debts, the omiſſion and neglect whereof may be imputed unto him as a default juſtly occaſioning recompence to be by the Law required from him. But perhaps he may excuſe himſelfe that he could not find a Chapman who would give him to the value thereof: hereunto yet reaſon can eaſily reply, that it had beene much better to have ſold it under the value, then to have loſt the whole value, by expoſing or abandoning it to a totall forfeiture. Yet *Quere.*

Chap. XI.

How farre, and where an Executor having Assets is chargeable or lyable to Action.

HAving considered what things shall come to Executors and be Assets in their hands, for the performance of the Will; Let us now consider what thing the Executor is bound to pay, satisfie, or performe, and what not, where he is chargeable, and where not, this being admitted, that he hath Assets, *viz.* sufficient wherewith to performe.

Here we will consider of these parts.

1. *Of debts by Specialty or Record.*
2. *Debts or duties by contract without Specialty.*
3. *Debts without either contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOuching Debts by Specialty, which are the most usuall and common obligements, it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The most doubt will arise upon Bills, and such Writings, Obligatory made, not by Scriveners, nor Clarkes, in common forme, but by others, otherwise for haste, or through simplicity. Thus long since we finde a Writing
22.6.422 made by *A.* to B. *memorand.* that I have received of B. ten pound, which I promise to pay, &c.

This

This being sealed and delivered, was held a good Obligation by *Brian* and *Catesby*. So if the words had beene onely, I shall pay to B. ten pound, and whether such words or the like, as Covenant, or Grant to pay, be in the forme of a Bill or Bond, or in an Indenture or Articles, it is a sufficient ground for an Action of debt. And though it should be miswritten *Wigint.* for *vigint.* or fitteene for fifteene, yet shall it be favourably construed, and held a good specialty of debt, as hath beene resolved in these and like cases; and so also notwithstanding false Latine in the Obligation, or the plurall number for the singular number, or words of repugnancy or non-sense, yet if there be words whereby it appeares that *A.* is a debtor to B. and it be sealed and delivered, it is a good writing Obligatory; yea though it want the words of conclusion, *viz.* in witnesse whereof, as the Lord *Dyer* reports, to have beene resolved, although the contrary were held in foure severall Kings times before, as our Bookes shew. Now any such Writing Obligatory doth determine or drowne any duty by Contract, because specialty is of a higher nature, So as if *A.* and B. doe bargaine with *C.* to pay him a hundred pound for Corne or other thing, and after *C.* take some such Writing Obligatory, as aforesaid of *A.* now by this is B. discharged of the debt, because he stood charged onely by the Contract, which is extinguished by the said Specialty.

19.R.2.F. Det. 166. 9.H.6.7. 2.H.4.8. 23.E.M. 5. 9.H.7.16. 2.H.4.8. 28.H.8. Dyer 22. 28.H.8.Dy 19.& 22. 40.E.3. 1. 7.H.7.14. 8.H.5.36. 22.H.6.15 21.E.4.81. 3.H.4.17. 11.H.4.76.

As for the extent aud operation of these Specialties, to, and upon Executors, we must know that an Executor doth so represent the person of the Testator, and is so included in him, as that every Bond or Covenant by the Testator made

So reservation of rent grant of annulty. 28.H.8. Dy.14.& 22.

for payment of money, or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor binde him and his Executors by expreſſe words (and yet the Heire not named is not bound, though there be never ſo great Aſſets, or Land diſcend unto him.)

47.E.3.22
32.H.6.32
10.H.7.18

Now touching debts upon Record, much need not to be ſaid, (except of thoſe by Statute Merchant) for to debts and dammages already recovered againſt the Teſtator, and to debts by Recognizance the Executors liableneſſe is ſomewhat cleare and conſpicuous. Yet other inferior debts upon Record, may fitly be thought of, as Iſſues forfeited, Fines impoſed by Juſtices, at *Weſtmin.* or at Aſſiſes, Quarter Seſſions, Commiſſions of Sewers of Bankrupts, By Stewards in Leetes, or the like; for all theſe are debts of Record, which Executors ſtand charged withall. So alſo if the Teſtator were before Auditors found in Arrerages of Account, being a Bayley, or receiver: For theſe Auditors are by Statute, Judges of Record, but if the Account were made onely before the party to whom the Arrerage pertained, or but before one Auditor onely, it is out of the Statute, which ſpeakes of Accounts before Auditors in the plurall number. Therefore the Executor not chargeable, becauſe the Teſtator might wage his Law in thoſe caſes, nor in the former.

No mention of Executor in the judgement, yet he charged.

9.H.6.f.11
11.H.4.64
92. Otherwiſe of a Garden in Soccage, he is out of the ſtat. *W.* 2. *cap.* 11. *ut credo. Co. lib.* 10.103.

And whereas exception was before made of a debt by Statute Merchant, it was by reaſon that the Lord *Bro.* tels us that if the *conuſor* in that caſe be returned dead, no remedy appeareth for the Conuſee to have execution of the goods of the Conuſor, but only of his Lands. If this ſhould

36.H.8.Br. Stat. Mer. 43.

be

be thus, it were a very miſchievous caſe: for many bound in Statutes have no Lands but Leaſes and goods of great value, and if by their death, theſe Goods and Chattels ſhould be ſet free from this Statute, and the Creditor without remedy, the Law were very defective: and it were ſo much the more ſtrange in this Caſe, becauſe the Statutes of *Acton*, *Burnell*, and *Mercatoribus*, ſeeme to pitch principally upon Goods, and to tend unto aſſurance betweene Merchants, who uſually are not Landed men. But that the Law doth give remedy in ſuch Caſe, as well againſt the Goods as Lands of the deceaſed Conuſor, appeares by the reſolution of late, made in what Order, and Precedence, Statutes are to be ſatisfyed by Executors, as after wee ſhall ſee.

Of Debts by contract without Deed, as Leaſes Paroll, &c.

COntracts are of divers kindes, and we will begin with thoſe in the realty, as moſt worthy. If therefore one be Leſſee for yeares, or for life, without any Indenture or Deed, (as he may be) and his Rent being behinde, hee dyeth, now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Teſtator, if he had beene ſued in his life time, could not have waged his Law. But if the Leſſee for yeares in his life time ſell or grant away his terme or Leaſe, although he ſtill lye at the ſtake for the Rent, to grow due after, untill the Leſſor accept the Aſſignee for his Tenant. Yet if the Leſſee dye, his Executor ſhall not be charged for any Rent due, after the death of his Teſtator. But what if the Leſſee doe not Alien or aſſigne his

21.*H.* 6. 1. 44.*E.* 342. 44.*E.* 3. 5. 7.*E.* 3. 11. 14.*H.* 7. 4. *per Keble vide* 8.*E.* *Dy.* 247. *M.* 32. & 33 *Eliz.* in *com. ba.*

terme, but dye thereof possessed, and the Executor perceiving the Land not to be worth the Rent, Waiveth the same. Yet the Lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the Executor with the Rent, during the terme? I answer, that if he have Assets, that is sufficient for payment of this and other debts, he cannot Waive this Lease, but shall be tyed to answer this rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay money; Yet because it is yearely Executory, the Executor may Waive it, in case his Testators estate will not supply and beare that losse. But what if there be Assets to beare this yearely losse for some yeares, but not during the whole terme? I thinke in this case the Executor must pay the Rent, so long as this Assets will hold out, and then must Waive the possession, giving notice to the Reversioner; and this I thinke he may doe well enough notwithstanding his Occupation of the land divers yeares after the Testators death, because that was not voluntary, but as of necessity; yet this I leave as a *Quære*, to be well advised of with good counsell.

Do. & Shi. 131.

41. E. 3. 13
15. E. 4. 25
Except by a *Quo minus* in the Exchequer, for the Kings debtor. Co. l. 9. f. 98. a. So of accounts except for the King.

Of contracts personall.

WHere the Testator might wage his Law, there the Action lyeth not against the Executor; as hath beene touched, and therefore he is not chargeable in an Action of debt upon a simple contract, as by reason of this or that to his Testator; yea though it were the Inheritance of Land, which was sold, so as the sale were without Deed,

or

or though by Deed, yet if no counterpart were under the hand of him to whom the sale was made. And the custome of *London*, to the contrary, *viz.* that an Action of debt should be maintained against Executors upon a contract was held voyd, at least no good plea against other Creditors, that such a debt was recovered against the Executor, or paid by him, as was towards the latter end of the late Queenes time resolved, though in the beginning of her time, it was a demurrer. Yea, though such a debt grew for the most necessary thing, *viz.* meate and drinke, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age, but this is meant where the contract was onely by Word, for where the Testator putteth his Seale to any Deed or Writing made upon such sale, this is more than a simple Contract, and taketh from the Vendee his wager of Law, and so chargeth the Executor. But if the Testator seale but unto a tayle or tally, with scorches, expressing a debt, this is no such Specialty as shall charge Executors. Yet in some Cases without any seale at all, the Executor is chargeable. But although no Action of debt lyeth against the Executor upon such a simple Contract, yet may the Creditor, in that case, maintaine an Action upon the Case grounded, upon the assumption implyed, though not expressed, as now standeth resolved by all the Judges of all Courts at *Westminster*, though heretofore there hath beene much difference of opinion thereabout: And indeed thus the Executor is charged, in matter for a simple contract, though not in manner of a Debt; but as for breach of promise, making recompence in dammages, instead of the

M.33.& 33.El.in com.ba. By three Judges, & *37. Eli.* By all, as I find in my report, but *Co. l.5 f.82.b.* It is contrarily reported. *3.El.Dy. 196.* Demurrer. *9.E.4.51. 10.H.7.8. 15.E.4.16 22.H.6.13 39.H.6. 186.* There though a common hostler, or victualler, trust his guest, he loseth his debt by his death *Co.90.87.b. 12.H.4.28* But if the sum be also written on it, they are bound as by a Deed. *28.H.8. Dy.23.a. Slades* case. *Co.lib.4. Co.l.9.87. Pinchons* Case.

debt. And the chiefe reason for it, is because
2.H. 4.14. the Testator could not have waged his Law in this Action upon the case against himself, though in debt he might. Where the Testator retaineth servants in Husbandry, or otherwise, and dyeth, there being wages due to these so retained, the Executor is lyable to an action of debt for the
4.H.6. 16. same, by reason that the parties were compellable by Statute, thus to serve, and therefore the Testator could not have waged his Law; but in
11.H. 6.48 So 2.H.4.f. 14. Servitors in the warre by contract. case of Servants not compellable, as Waiters or Servingmen, as we call them, no action of debt lyeth against the Executor, for their wages, though against the Testator himselfe it doth: for the Contract is sufficient to charge him who made it. See of account after.

Where Executors shall be charged without either Contract or Specialty.

WHere a Prisoner oweth money to a Jaylor, or Keeper of Prison for his dyet, or victualls,
27.H.6.4. 15.E.4.16. Co.lib 9.f. 87.b. Nota.br. 121.a. He must have a *liberate* also. and dyeth, his Executor shall be chargeable for this debt, because it is for the Common-wealth to have Prisoners kept, which cannot be without affording them victualls: Also, where one hath a Patent, or Tally of the Exchequer, to receive money of some Customer, Receiver, or other Officer of the Crowne, and delivereth it to
27.H.6.4.b 1.H.7.17. 2.H.7.8,9. Clarke of the Hamper 10.H.6.24, 25. him, he then having money of the Kings in his hands, if he pay not the same, but dye, his Executor shall stand chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more than one, but this is debt of Record in Law.

So if any Lord of free Tenants, doth levy ayde

of

of them for the marriage of his eldest Daughter, and he dye before she be marryed, she may recover this money by an action of debt against his Executor, but this is by vertue of a Statute. There is a president in the Booke of Entries of an Action of debt against the Executor of an Heire, by which it seemes that a man binding himselfe and his Heires, and leaving Assets, the Heire taking the profit, becomes so a Debtor, that his Executor shall be charged. And in the Register there is a Writ against the Executors of the Guardian of the Spiritualties of the Arch-Bishop of *Yorke*, for the debt of *B.* who dyed Intestate, and whose Goods came to the hands of the said Guardian, *viz.* the Deane of *Yorke*. In allowance whereof there is a note added of the like writ, brought in K. *R.* 2. his time, and that then a president was alledged of such a Writ in King *Ed.* 2. his time, against the Executors of an Ordinary, and that they were inforced to answer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabile parte bonorum* by custome in some places is maintaineable for the Wife and Children, against the Executor. But no action of account lyeth against Executors, except for the King. More hereof, tit. Wrong.

No. na. br. 82, 83. *Westmin.* 1. *c.* 35. *Lib. Intr.* 172. *b.*

Reg. orig. 141. *a*

11. *R.* 2. 16 *E.* 2.

11. *E.* 3. *Fit Ex.* 77. See *Co. lib. Intr.* 564. Such an action in *Yorkeshire.*

Of Covenants charging Executors.

WE have already touched upon Covenants in part, *viz.* where they be expressely for payment of money, shewing them to be in Law bonds, that is, Writings Obligatory, whereupon an action of debt may be brought, as well as an Action of Covenant, though the words of the Deed

Inter Andrewes & Elsrigge circiter 33. *Eliz.*

Deed, beare the ſound and phraſe of a Covenant. Yet in ſome Caſes no action of debt lyeth upon a Covenant to pay money: as if *A.* covenant, that his Executor ſhall within a yeare, or ſuch a time after his death, pay ten pound to *B.* now for that no action or debt was maintaineable againſt *A.* himſelfe, it lyeth not againſt his Executor, but onely an action of Covenant, as was held in the late Queenes time. So if the Covenant be conditionall, as thus, that if *C.* doe not pay to *B.* ten pound, then *A.* will pay it, and ſo alſo perhaps, if the Covenant be in the diſtinctive, *viz.* to doe ſuch an act or to pay ten pound, now if the act be not done, yet no action of debt lyeth for the money, but onely an action of Covenant. But now let us come to the Caſes of meere Covenants, and ſee which of them will charge an Executor, and which not. If a Leſſee for yeares covenants to repaire the buildings, or to pay the Quit-rents, iſſuing out of the Land let, there is little doubt, but the Executor to whom the terme commeth, muſt as well as his Teſtator, performe that Covenant, although he did not covenant for him and his Executors, and yet of theſe caſes doubt hath beene, and touching the latter, *viz.* of paying Quit-rents, divers Juſtices in Queene *Maries* time, were of opinion that it was a thing ſo perſonall that it dyed with the perſon, and did not charge the Executors; Nor is there any contrary opinion expreſſed in the Booke. And ſince that time, *viz.* towards the end of Queene *Elizabeths* raigne, in the Action of Covenant betweene the Deane and Canons of *Windſor*, and *Hide*, touching reparations, at the firſt, much opinion was, that onely the perſon Covenanting was tyed to this performance, but after it was reſolved

Paſ. 33. *Eli. inter Eor.* & *Auſtin. in com. ba. Qua* if both be to be done by the covenanter, *viz.* ten l. if not five ſuch a day. So in *Penots* Caſe.

But where the Leſſor did Covenant to pay the quit-rent, Divers Juſtices thought the Executor not named was not bound, 1. & 2. *P. & M. Dy.* 114. Note the Caſe is *ut ſupra* in marg.

Paſ. 38. *El. in ba. reg.*

Co. l. 5. *f.* 24.

that

that that Covenant did runne with the eſtate, and ſo both Executor and Aſſignee bound to performance; but in that caſe it was ſaid by *Popham* Chiefe Juſtice, that if the Covenant had beene to doe a Collaterall act, neither the Executor nor the Aſſignee had beene tyed thereby, and therefore where a Leſſee for yeares covenants within ſuch a time to build a new houſe upon the Land, and dyes before that time expired, I doubt whether the Executor be bound to performe this, or not; although it doe concerne the Land let, ſo as perhaps the Rent or Fine was the leſſe, in reſpect of this charge of new ſtructure or building, which is a great reaſon that the Executor, though not named ſhould be tyed to the performance: But if the Covenant had beene to build a houſe elſewhere then upon the Land let, or to doe any other collaterall thing, not pertinent to the Land let, it is cleere the Executors were named to performe it: and yet in thoſe caſes, if there were a breach, or non-performance in the Teſtators life time, as that the time of performance were expired before his death, then it is cleare the Executors were bound to yeeld recompence by way of dammages recoverable, in an action of Covenant, as both *Shelley* and *Fitzherbert* agreed, and ſo alſo did the Lord *Popham* agree in the ſayd caſe of *Hide*, as I finde in my owne report of that Caſe, though in the Lord *Coke* reporting onely the point in queſtion that be not mentioned; Now let us conſider of the caſe, where there is no expreſſe Covenant at all, ſo much as for the Leſſor himſelfe, but onely a Covenant implyed, or Covenant in Law, as we call it. As if Leſſee for life, make a Leaſe for yeares, and dye within the terme, ſo as the Leſſee is evicted by him in reverſion,

Reſolved, *P. 39. Eliz.* but not adjudged till *M. 43 & 44. Eliz.* 1

Tr. 28. H. 8. D. 1. 14. There the houſe was to be built upon the Land leaſed and yet *Baldus* ſeemed of a contrary opinion.

M.8. & 9. El. Dy. 257 Intrat. M.7 & 8. Eliz. fol. 111. 37. Swanne verſ. Strangſham & Searles.

reverſion, or remainder. In this caſe it was reſolved in the late Queenes time, by three Juſtices, *viz. VValſh*, *Browne*, and *Dyer*, that by this Covenant in Law, the Executors were not chargeable, and in the ſame caſe the Lord *Dyer* ſets downe another reſolution after, to the ſame effect, but Maſter Serjeant *Bendloes* reporting this latter caſe to be of a Leaſe made by Tenant in tayle, *viz.* before the Statute of 32. *H.* 8. or not warrantable by it, ſets downe the opinion contrarily, *viz.* that the action was maintaineable againſt the Executor. This may ſerve for inſtance, the like being in any other caſe, where the Leſſor hath not a good, and a firme title, but perhaps ſubject to a Condition or other eviction, ſo as the Leſſee cannot injoy the Land according to his Leaſe. But this muſt be ſo underſtood, that no eviction, or breach of Covenant, is in the life of the Teſtator himſelfe, for if that be, there is no queſtion, but the Executor ſtands chargeable; and therefore if one make a Leaſe of Land by Deed, wherein he hath nothing; this Covenant is perhaps preſently broken, and though the Leſſor dye before an action of Covenant brought, it will be maintaineable againſt his Executor, though no expreſſe Covenant. This is uſefull to be knowne, though in theſe dayes there be few Leaſes ſo made, without expreſſe Covenant, and the Executors alſo named. And where there is a ſpeciall Covenant in expreſſe words, it doth qualifie the Covenant implyed, ſo as although words of demiſe and grant tye the Leſſor to a generall Warranty of the title, againſt all men, yet it being after covenanted, that the Leſſee ſhall enjoy againſt the Leſſor and his Heires, or againſt all, claiming under him or his Anceſtors; Now no eviction

Tr. 32. Eliz. 459. inter Broderidge & Winaſor.

Noke and Anders caſe

eviction by or under any other title, giveth cauſe of Action, or bindeth the Leſſor or his Executor to make recompence.

Of wrongs done by Teſtators, and whether Executors be lyable to amends.

ALthough Executors doe repreſent the perſons of their Teſtators, yet if the Teſtator commit any treſpaſſe upon the Goods of another, or upon his perſon, of Lands no action lyeth for this, againſt the Executor, for *Actio perſonalis moritur cum perſona*; So if a Sheriffe, Jaylor, or keeper of Priſon, ſuffer one in execution for debt or dammages to eſcape, though hereby the party, at whoſe ſute the Execution was, be intitled to an action, *viz.* an Action upon the caſe, againſt ſuch Officer, by the Common Law, and by Statute an action of debt; yet if he ſo ſuffering dye, for that ſuch ſufferance was a wrong of th nature of a treſpaſſe, no action lyeth againſt his Executor for the ſame. And upon the ſame reaſon, as I preſume, if one carry away his Corne, and Hay, without ſetting out the Tenth, although the treble value be recoverable againſt him in an action of debt, yet if he dye before ſuch recovery, the action is gone, and lyeth not againſt his Executor; No not although the Teſtator were a Leſſee for yeares, ſo as his ſtate came to his Executor. 42. *Aſſ.* p. 15. 40. *E.* 3 *Fitz. Ex.* 74. *Co. lib.* 9 *f.* 87. *a.*

Like Law in other penall Statutes, as for arreſting one at the ſuite of *I.S.* without his privity or aſſent; Or, for not appearing as a Witneſſe, being ſerved with a *ſub pœna*, and having charges tendered and many like; yea, if a Leſſee for yeares commit waſte and dye, no action lyeth againſt the

the Executor for this waſte; for all theſe caſes are within the rule of *Actio perſonalis moritur cum perſona*, and many other like Caſes might be put, but theſe may ſuffice. Yet if a Parſon, Vicar, or other ſpirituall, or Eccleſiaſticall perſon doe ſuffer a ruine or decay of the houſes or buildings upon his ſuch ſpirituall Benefice or promotion, and dyeth, his Executors are lyable, by the ſpirituall or Eccleſiaſticall Law, to the ſucceſſors Suite for amends to the repairing of ſuch ſpoyle or decay. And becauſe ſome uſed fraudulently to grant away their Goods, ſo as nothing
13. El. c. 10 ſhall be left to their Executors, it was enacted *temp. Elizabeth*, that ſuch Grauntees of Goods ſhould be lyable to the ſucceſſors ſuite, for theſe *dilapidations*, as if they were Executors.

As for one other caſe of this nature, *viz.* where an Executor waſteth the Goods of his Teſtator, or an Adminiſtrator of the goods of his Inteſtate, and dyeth; Whether his Executor be ſubject to Action for this or not: I adjorne the reader to that place where I ſhall treate of ſuch waſting, or devaſtation by Executors.

Unto this head, not unfitly, may be referred,
Fitz. Ex. 77 what before is ſaid of Actions againſt the Executors of the Debtors Heire, and the Executors of the Ordinary, for the Specialty, binding to payment reacheth not to any of theſe; but becauſe their Teſtators ſhould have payed theſe debts with the goods or profits of the Lands of the Debtor, and did not, but retained them to themſelves; therefore for this as a wrong, are they ſuable; as I take it. So alſo by the ſame reaſon are the Executors of an Adminiſtrator chargeable where he did neither pay the debts, nor leave the goods to the next Adminiſtrator, but otherwiſe

I conceive no difference betweene this and the other caſes, ſupra.

wiſe diſpoſed of them. Yet an Executor is not chargeable in an action of *Detinue*, nor of account (except to the King) for the Teſtators detaining, and not paying or anſwering things received, or under his charge.

2. *H.* 4. 13. He may by admit *Co. l.* 11. *f.* 88. 3. *H.* 6. 35. *Con.* for arrerages of an account before auditors. 11. *H.* 4. 64. 92. 9. *H.* 6. 11. 13. *Ed.* 1.

And the reaſon why, after account made before Auditors, and the Bayley, or receiver be found in Arrerages and dye, that in this Caſe his Executor is chargeable, is, becauſe the auditors are made Judges by the Statute, *VVeſt.* 2. *cap.* 11. and ſo this Arrerage which they have judged, is a debt by Record.

But if the caſe be put on the other ſide, *viz.* that the Bayly, or Receiver, have found in ſurpluſſage upon his Account, *viz.* that he hath laid out more in his Lords or Maſters buſineſſe, then his receipts amounted unto, and then his Lord or Maſter dyeth, now ſhall not he have any action againſt the Executors, for the ſurpluſſage, becauſe it is out of the purview of the ſaid Statute.

Co. lib. 9. *f.* 87. *a.*

CHAP

Chap. XII.

Of the Order and method to be uſed by Executors in payment of debts, and Legacies, ſo as to eſcape a devaſtation or charging of their owne goods.

WE have gone through and diſpatched the two firſt propoſed parts, *viz.* 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. Wee come now to the third part, *viz.* their doing or diſpoſing of the teſtators eſtate.

Now this conſiſts principally in the iſſuing of money, though partly alſo in delivering or aſſenting to the execution of Legacies, not being mony but other goods or Chattells bequeathed.

Money is to bee iſſued by Executors, foure wayes ordinarily.

About the funerall of the teſtator.

About proving his Will.

In paying of debts.

In paying and ſatisfying of Legacies pecuniary.

As for the firſt, burialls be as of neceſſity for two reſpects, *viz.* 1. Of charity to the dead, that hee may bee Chriſtianly and ſeemely interred. 2. To prevent and avoyd annoyance to the living who by the very view of dead carkaſes, would both be affrighted, & within a few dayes diſtaſted at the noſe. Wee know that under the Law, the touching of a dead carkaſe made a man uncleane and to need purifying: nor can wee eaſily forget

what the ſiſters of *Lazarus* ſaid to our Saviour touching their brother, when hee had beene dead two or three dayes : *viz.* that the taking of him then out of his grave muſt needs bring a noyſome ſavour. Hereabout therefore, ſome expence is neceſſary, and that not only for fees to be paid, which in *London* amounts to a conſiderable ſumme, ſpecially for ſuch as are to be buried within the Church, but alſo otherwiſe, *viz.* for the Pall or Hearſe-cloath, the ringing, &c. As for feaſting, and banqueting, it ſeemes not to mee congruent to the ſadneſſe and dolefulneſſe of the action in hand. But howſoever that be yet where the teſtator leaves not ſufficient goods to pay his debts, feſtivall expence is to bee forborne, except the Executor will out of kindneſſe beare it with his owne purſe ; for dead debtors muſt not feaſt to make their living creditors faſt. I mentioned a conſiderable amount of funerall fees payable in *London*, and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kind, and eſpecially for thoſe who dying there, are yet carried into their countries to be buried, the exaction bee not either unjuſt altogether, or too onerouſly exceſſive, ſo alſo for for much ringing contrary to the Canon made at the Convocation in the firſt yeare of King *Iames*.

The next thing mentioned to juſtifie and occaſion expence, is the proving of the Will : But this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a caveat put in or the like) will not ſtand allowable then is preſcribed by the Statute made in the time of *Hen.* 8. whereby the fees of Ordinaries, and their Scribes, Regiſters, and Officers be limited. And it is ſtrange that theſe bounds haue beene ſo much

21. Hen. 8. cap. 5.

and

and ſo frequently broken and tranſgreſſed, the rather, for that long before in the time of King *Edward* third, by an Act of Parliament, it is provided that the Kings Juſtices ſhould as well at the Kings ſuit, as at the parties grieved, enquire after ſuch oppreſſions, or extortions, for ſo they be called; yea S. *Germ.* who was no ſtranger to the civill & cannon law, as appeares by his booke, ſaith that the Ordinary ought to take nothing for the probate, if the goods ſuffice not for funerall and debts; but hee meanes only that conſcience is againſt it. 13. Ed. 3. cap. 4. Do. & Stu. li. 2. cap. 20

Now we come to the third occaſion of diſburſment, *viz.* payment of debts, which is the maine part of our buſineſſe. We have before ſeene what debts lye upon executors, having aſſets to pay them; we are now to ſee in what order they muſt pay them, as well *Vt ſint fidi diſpenſatores*, as for their owne indempnity, *ne quid res ſua capiat detrimenti*. To put our ſelves into the better order or method of handling theſe things, we will ſort our debts into their ſeverall kinds thus.

They are of theſe three ſorts, *viz.* either,

Debts of or upon record.

Or debts by ſpecialty.

Or debts without ſpecialty.

The debts upon record may bee againe divided into foure ſorts or kinds, *viz.*

Debts to the King or the Crowne.

Debts by judgement or recovery in ſome court of record.

Debts by recognizance.

Debts by ſtatute ſtaple, or ſtatute merchant.

Amidſt theſe, the debts to the Crowne are to have the firſt place or precedence, ſo as if there be not come to the executor goods of greater valew

then will ſuffice for the ſatisfaction of theſe, he is not to pay any debt to a ſubject, and if he be ſued for any ſuch, hee may plead in Barre of this ſuit that his teſtator died thus much indebted to the King, ſhewing how, &c. and that hee hath not goods ſurmounting the value of that debt. Or if the ſubjects purſuit be not ſo by way of action, as that the executor hath day in Court to pleade, but bee by way of ſuing execution, as upon ſtatute marchant, or ſtaple, then is the executor put to his *audita querela* wherein he muſt ſet forth this matter. And there is great reaſon why the Kings debts ſhould thus be preferred before any ſubjects *viz.* for that the treaſure Royall is not only for ſuſtentation and maintaining of the Kings houſehold, but alſo for publick ſervices, as the warres, &c. as appeares by the ſtatute, 10. *Rich.* 2. *cap.* 1. And therefore it is as I conceive, that *Bracton* ſaith of the treaſures or revenues Royall, *Roborant coronam* they do ſtrengthen or uphold the Crowne. And for the like reaſon as I thinke, did God inact touching the poſſeſſions of the Crowne, that if they were given to any other then the Kings owne Children, they ſhould revert and come back to the Crowne the next Jubilee, which was once in fifty yeares, *ſed de hoc ſatis.* But this priority of payment of the Kings debt before the debt of any ſubject, is to bee underſtood onely of debts by or upon record due to the King, and not of other debts. If any aske how the King ſhould have any debts which ſhall not be of record, ſince by the ſtatute 33. of King *Hen.* 8. *cap.* 30. it is inacted that all Obligations and ſpecialties taken to the uſe of the King ſhall be of the ſame nature as a ſtatute ſtaple: To this I anſwer, that there may bee ſummes of money due to the King upon woodſales

M 33. & 34. Eliz. the Lady Walſinghams caſe in com. ba. & Tr. 39. Eliz.

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21. E. 4. 21, 22. So muſt it be pleaded M. 33. & 34. Eliz.

woodſales or ſales of Tinne, or other his minerals, for which no ſpecialty is given; ſo alſo of amerſements in his Courts Baron, or Courts of his Honours, which be not Courts of record: The like of fines for coppyhold ſtates there. So of the money for which ſtrayes within the Kings Mannors or liberties are ſold. Alſo as the law hath lately beene taken and ruled in the Exchequer, even debts by contract due to any ſubject, are by his outlawry or attainder forfeitable to the Crowne. Yet neither theſe nor thoſe due to ſuch perſon outlawed or attainted by bond, bill, or for arrerage of rent upon leaſe is or can be any debt of record untill office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appeare by any record before office found that any ſuch debt was due to the perſon outlawed or attainted. Thus are not theſe debts to the Crowne to have priority of payment before the ſubjects debts, though the Kings debts of record are ſo to have; ſo that if a ſubject to whom the teſtator was indebted by ſpecialty ſue for this debt, the executor muſt plead that the teſtator dyed indebted thus much to the King by record, more then which hee left not goods to ſatisfie; if the truth of the caſe ſo be, for if there be ſufficient to ſatisfie both, then the ſubject creditor is not to ſtay for his debt till the Kings debt bee levied. And if the ſubject creditor ſue execution upon a ſtatute, ſo that the executor hath no day in Court to plead this debt to the King, then is the executor put to an *audita querela*, wherein he muſt ſet forth that matter, and ſo provide for his owne indempnity. But what ſhall wee ſay of arrerages of rent due to the King? ſurely where it is a fee-farme, rent, or other rent of inheritance, I ſee not

And muſt plead the record in certaine as was held in the caſe of the Lady Walſingham, M. 33. & 34. Eliz but it ſufficeth to ſay, by a record of the Exchequer, as was held Tr. 39. Eliz. in b reg.

how it can come under the title of debt, ſince for it no action of debt is maintainable ſo long as the ſtate continueth in him to whom it grew due, and I find that the *Lo. Dyar. M. 14 Eliz.* ſaid that the King could but onely diſtraine for his rents, and not otherwiſe levie them of lands or goods; and that the King by his Prerogative may diſtraine in any other lands of his tenant our books tell us, but no more. Yet I know it hath beene otherwiſe done of late in the Exchequer, which if it have been the ancient and frequent uſe of the Exchequer, it will ſtand as law though unknowne to the *Lo. Dyer*. Now rent upon a leaſe for yeares differeth from the other, ſince for the arrerages thereof an action of debt lyeth, but how can either of theſe bee debts of record, when the not payment may bee either in the Court of Exchequer, or to the receiver generall or particular? and how then can there bee any certaine record of the not payment, ſo as to make any certaine debt upon record? Wee know ſtatutes have beene made to make the lands of receivers ſubject to ſale for ſatisfiction to the Crowne; and beſides that ſome ancient Patents direct the payment of Fee-farmes into the hands of Sheriffes, the ſtatute of Weſtm. 1. *cap.* 19. provides remedy for the King againſt Sheriffes not anſwering the debts of the Crowne by them received: ſo as the Kings Farmer or debtor may have paid his rent or other debt, and the Crowne have not yet received it. Of Fines and amercements in the Kings Courts of Record, there is no doubt but they are debts of record.

Come we now to the debts of ſubjects, and firſt thoſe of record; touching which, I ſhall not be able to hold ſo good a method, and ſo well to handle things by parts as I would, for that the parts

parts ſo ſtand in competition one with another for precedencie, as that they muſt of neceſſity thereabout conflict and interplead one with the other, and conteſt one againſt the other: yet for the Readers better eaſe and ability to find out that which may concerne him in his particular caſe, I will in the beſt ſort I can ſingle out theſe things into ſeverall parts, and place them in ſeverall roomes or ſtations. Firſt, conſidering how it ſhall ſtand betweene one judgement and another had either againſt the executor or teſtator. Secondly, how betweene judgements and ſtatutes, or recognizances. Thirdly, how betweene recognizances and ſtatutes. Fourthly, how betweene one recognizance and another. Fifthly, how betweene one ſtatute and another, adding to each ſome obſervations incident.

Now next to the debts of the Crowne are judgements or debts recovered againſt the teſtator, to have priority or precedencie in payment, as being of an higher nature, or more dignity than any other, for that ſtatutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary conſent of parties, whereas in every judgement there hath beene a courſe and worke of Juſtice againſt the will of the defendant, as is preſumed; and this in a court of juſtice, and the records of ſuch judgements are entred in publike rolls, not kept or carried in pockets or boxes as ſtatutes, and untill inrolment recognizances are. Therefore executors muſt take heed that judgements againſt their teſtators before debts any other way, if they hwe not ſufficient for both, be firſt ſatisfied: leſt they draw the burthen of this debt upon their owne backs. Now their way to helpe themſelves being ſued, or purſued

Co. lib. 5. f. 28. So Wray and Gaudy inter Bond & Bales 28. E. vel circiter.

ſued for other debts, is the ſame before delivered touching debts upon record to the Crowne, *viz.* by plea, where they may plead, as in *Scire facias*, upon a recognizance or ſuit upon band, and by *Audita querela*, where they cannot plead, as when execution is ſued upon a ſtatute. And if they had no warning in the *Scire facias*, but upon *nihil* returned the judgement paſſed, there alſo the executor may be releeved by *audita querela*, becauſe there was no default in him that hee did not plead or ſet forth the judgement upon the ſuit in the *Scire facias*. Nor will it be any plea for the creditor by ſtatute to ſay that his ſtatute was acknowledged before the judgement, and ſo is more ancient, for a latter or more puiſne judgement is to be preferred before a ſtatute in time precedent. But if this judgement be ſatisfied, and it only kept on foot to wrong other creditors, or if there be any defeaſance of the judgement yet in force, then the judgement will not availe to keepe off other creditors from their debts: And thus much touching debts by judgement, *viz.* how they ſtand in priority before other debts by ſtatute or recognizance. Now to ſee how they ſtand among themſelves, let this be obſerved, *viz.* that betweene one judgement and another had againſt the teſtator, precedencie or priority of time is not materiall, but he which firſt ſueth execution muſt be preferred, and before any execution ſued, it is at the election of the executor to pay whom he will firſt; yea, if each bring a *Scire facias* upon his judgement, the executor may yet confeſſe the action, of which he will firſt, notwithſtanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the defendant may plead generally that hee hath fully adminiſtred before the *Scire facias* brought

Yea though a writ of Error by the executor to reverſe the judgement yet ſuffering a ſtatute to be executed, muſt pay of his owne. Read and Bearblocks caſe. P. 43. Eliz. Ba. re. So held in Reads caſe ſupra. vide 12. H. 7. Kelw 24. 25 to like purpoſe. Co. lib. 4 f. 59. So Periam in com. ba. inter Charnock & Worſley. 24. Eliz. vel circiter. Co. l. 5. f. 28. Co. lib. 8. f. 132. So held in 15 & 16. Eliz. So in the *Sc. fac.* by bond againſt Bales it was held.

brought without ſhewing that he did adminiſter in payment of debts of as high nature ; yet that muſt be proved upon the evidence, elſe the triall will fall out againſt the executor. Thus have I delivered the moſt materiall things in my apprehenſion touching debts by judgement ; yet thereabout I will adde for the better information of the Reader, not ſtudied in the Law, theſe few things. Firſt, that what hath beene ſaid is only to be underſtood of judgements againſt the teſtator, and not of any againſt the executor himſelfe, for of thoſe being but debts by ſpecialty at the time of the teſtators death wee ſhall ſpeake after. Secondly, what is ſaid of the teſtator in caſe of an executor immediate, is likewiſe to be underſtood of the teſtators teſtator in caſe of the executor of an executor, for where *A.* makes *B.* executor, and *B.* makes *C.* executor, there the goods which came from, or were left by *A.* be not in the hands of *C.* lyable to judgements had againſt *B.* Nor on the other ſide, are the goods of *B.* in the hands of *C.* ſubject to the judgements had againſt *A.* And the like is to be underſtood of ſtatutes, recognizances and bonds, as elſewhere is ſomewhat touched. Thirdly, Recoveries or judgements by meere confeſſion, without defence, are yet of the ſame nature, and to have the ſame reſpect as other recoveries upon tryall or otherwiſe ; for although they may ſeeme to be but of the nature of recognizances which bee *debita recognita*, yet doe they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it, but in caſe of a recognizance it is not ſo, for there uſually no action is entred, nor debt demanded. Fourthly, the foreſhewed reſpect to debts by judgement,

9. El. 4. 14. 15. Qua. of arrerages of account before auditors without ſuit, for the executors are charged by judgement of the Auditors, by ſta. W. 2. judg. of record. 10. H. 6. 24. 25. Bre. det. 183.

judgement, is not to be incloſed within Weſtminſter Hall, & be reſtrained to the foure Courts there, but may and muſt extend it ſelfe to judgements in other Courts of Record, *viz.* in Cities and Townes Corporate, having power by Charter, or preſcription to hold plea of debt above forty ſhillings, as in London, Oxford, &c. For although there execution cannot be had of any other goods than ſuch as be within the jurisdiction of that Court, yet if the Record be removed into the Chancery by *Certiorari*, and thence by *Mittimus* into one of the Benches, ſo execution may bee had upon any goods in any County of England. Fifthly, in caſe where the teſtator was bound in a recognizance and a *Sci. fac.* brought againſt him, and thereupon judgement given; Although this judgement be not *quod recuperet*; as in caſe of actions of debt, but *quod habeat executionem*, yet ſince execution is the life, fruit, and effect of all judgements, this may now well ſtand for a debt by judgement, as I take it.

Qua. of judgement in a writ of Annuity for arrerages after.

Of Recognizances and Statutes.

NExt unto debts by judgement, are thoſe by ſtatute or recognizance to bee regarded by the executor. And becauſe I find no difference of priority or precedencie betweene theſe two, I therefore rank them together; yet one reaſon of preferment given to judgements before ſtatutes in *Harriſons* caſe, *viz.* that the one remaines a record upon the roll in the Kings court, whereas the other being carried in the pocket of the couniſee is more private. This, I ſay, ſhould give priority alſo to recognizances before ſtatutes, as alſo another reaſon, for that ſtatutes are not properly

perly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the ſtatute is the more expedite remedy, ſince thereupon execution may bee taken out without any *Scire facias*, or other ſuit, which cannot bee in the caſe of a recognizance; for there if a yeare bee paſt after the acknowledgement, no execution can bee ſued out againſt the party himſelfe acknowledging it, without a *Scire facias* firſt ſued out againſt him: And if he be dead, then though the yeare be not paſt, yet muſt a *Scire facias* be ſued, and thereupon the executor defendant may plead ſome plea, to hold off the execution for a time. But this notwithſtanding, the executor may ſatisfie the recognizance before the ſtature, at leaſt if he doe it before execution ſued thereupon; for they ſtanding in equall degree, it is at his election to give precedencie and preferment to whether hee will. Neither is it materiall which of them were firſt or more ancient; nor betweene one ſtatute and another doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the conuſor it doth; but as for his goods in the hands of his executor, whoſoever firſt getteth hold of them by his execution ſhall have the preferment. And before ſuing of execution, the executor may give precedence or preferment to whom hee will. But now ſome may object that there is no courſe nor writ of execution for any ſuch couniſee againſt the executor, and if ſo, then ſtatutes merchant, and of the ſtaple, are in vaine ſpoken of, and it is true that Maſter *Brooke* after Chiefe Juſtice of the Common Pleas in his new caſes profeſſeth, that he knew not any remedy for the creditor out of the goods of the conuſor

Before *Scire fac.* not after volantarily, but if levied by writ of *Extend. fa.* good.

Bro. No. c. 294 & Stat. Mar. 43.

conuſor after his death. But if this ſhould be ſo, the Law were very defective, ſince the ſubſtance of many, eſpecially of marchants, for and among whom the ſtatute marchant was provided, conſiſteth uſually more in goods then lands; beſides the plea of Harriſon, adminiſtrator of the goods of Sidney in barre of Greenes action of debt upon an obligation, *viz.* that the inteſtate ſtood bound in a ſtatute ſtaple to I. S. and Greenes reply thereunto, that there were Indentures of defeaſance, no covenant whereof was broken, and the reſolution of the Judges that the ſaid matter in the replication was good to avoid the defendants plea. All this, I ſay, and the reſolution of the Judges of the Common Pleas in that caſe, and in the caſe betweene Pemberton and Batram, as alſo in the Kings Bench by Popham and the reſt of the Judges, that executors muſt ſatisfie judgements before ſtatutes, and ſtatutes before obligations, had beene idle, and ſavouring of groſſe ignorance, if no execution at all could be had againſt the executors of him bound in a ſtatute, and then ſhould Green have demurred upon the plea of Harriſon, and needed not to have pleaded that other matter. but none of the Judges or Serjeants ever conceited any ſuch matter: that which there was replyed, *viz.* that the ſtatute was not forfeited, is here to be remembred, as good matter both againſt ſtatutes and recognizances, and that whether the recognizance have a defeaſance or a condition not broken, ſo that the recognizance is not forfeited. In none of theſe caſes is the executor hindred from payment of debts by ſpecialty, nor can he be juſtified or excuſed if by colour thereof he refuſe ſo to doe; and indeed elſe might creditors be exceedingly defrauded by recognizances for the peace

Co. l. 5. f. 28 b. H. 40. Eliz rot. 119.

P. 32. Eliz. rot. 235. in co. ba.

See Co. lib. 5. 91. execution againſt an Exec. upon a ſtatute. Semaines caſe.

Co. lib. 5. f. 28. So if ſatisfied, though not diſcharged.

peace and of good behaviour, &c. and ſo by ſtatutes for performing covenants touching the enjoying of lands, if theſe ſhould keepe off the payment of debts, and yet themſelves perhaps never be forfeited, nor the ſummes become payable.

Of Debts by ſpecialtie.

NOw come wee to Debts due by ſpecialtie, *viz.* Bond or Bill (of which nature the greateſt number of debts are) let us then ſee what courſe the Executor muſt or may hold for ſatisfaction of theſe, admitting that the teſtator ſtood not indebted by any record, or that no forfeiture is of any ſuch debt, or that there be goods in the executors hands above the amount of ſuch debts by record. This I ſay *dato*, then according to the rule *Proximus quiſque ſibi*, the executor may firſt ſatisfie himſelfe of ſuch debts, as the teſtator by ſpecialty owed him: for ſuch debts are not releaſed by the creditors taking upon him to be executor to the debtor; though on the other ſide if the creditor make his debtor executor, this is a releaſe of the debt. Although it be given out or commonly ſpoken in the generall, that an executor may firſt pay himſelfe, yet is it to be underſtood with this caution or condition, *viz.* That the debt to him be of equall height or dignity with the debts to others according to the rule *Inæquali jure melior eſt conditio poſſidentis*, for if his teſtator were indebted to other men by any ſtatute, judgement, or recognizance, and to him whom he maketh executor only by bond, or other ſpecialty, then may he not firſt pay himſelfe, that is, by paying of himſelfe leave them unpaid whoſe debts are of an higher nature; but if there be ſufficient for ſatisfaction

faction both to them and himselfe, then is it not materiall which be first paid. Now touching the debts to other men, the executor hath power to give preferment in payment to whom he will; so that if the testator left but an hundred pounds, being indebted to *A* an 100. pounds, and to *B* an 100. pounds by severall obligations, the executor hath power to pay *B* his whole debt, and to leave *A* altogether unpaid any part of his debt, so as he have not commenced any suit before payment to *B*. But yet herein this difference is to bee taken and observed by executors, that if the time of paiment upon the bond of *B* were not come at the time of the testators death, then may not the executors before the money to *B* become payable pay him and leave *A* unpaid whose money was presently due. Yet if *A* forbeare to demand or sue for his debt till the debt of *B* become also payable, then is it at the will of the executor to pay whether of them he will, so as the other may lose his whole debt, if the goods will not suffice to pay both. What if *A* have only by word demanded his debt, and not by suit before the debt to *B* become payable, whether doth that hinder that the executor may not now when the money to *B* is also payable, pay him and leave *A* unpaid. And hereunto *S. Germ.* answereth negatively, making this verball demand to be idle and of no value: yea, he addeth that if *A* have commenced suit before the debt to *B* become payable, yet if the executor can delay the suit till the debt of *B* become payable, so that *A* can get no judgement before that time, and before *B* hath commenced suit upon his band, then may the executor confesse his action, and so pay his debt, leaving *A* unpaid. But of this I make some doubt, for that I find in 9. of King *Edw.*

28. H. 8. Dy. 32. Doct. & St. ca. 10. p. 78.

Do. & St. p 78. Quæ. If then he may not plead this judgement *post ult.* contin. against *A.* as he may plead it against other suits after commenced. Co. li. intr. 148. 269. 149. a.

Edw. 4. ſome admittance, that if *A* having a Tally, Patent, or other Warrant from the King for receipt of money, of or from a cuſtomer or receiver where others had like warrants before him, but *A* maketh the firſt demand, now muſt the officer firſt pay him, or elſe himſelfe ſhall become debtor to him, if hee firſt pay others, whoſe demands were after made, though they had warrants before *A*. Likewiſe there is, as to me it ſeemes, ſome admittance in the ſame booke, that the very demand made by a creditor of his debt from an executor, who hath then aſſets in his hands doth intitle the creditor, to recover damages againſt the executor out of his owne goods; which if it ſo bee, then doth even that verball demand lay ſome tye or obligation upon the executor for payment. But hereabout, I lay downe nothing peremptorily. We partly may diſcerne by the premiſſes how the executor is to guide himſelfe in caſe, where there be divers debts by ſpecialty all due, and payable at the teſtators death: before any ſuit commenſed for any of them, for in that caſe cleerely the firſt verball demand gives not any precedence, all being due, and ſo ſtanding in equall degree; And this is implyed in many books, making the commencement of the ſuit only that which intitles to priority of payment, or at leaſt reſtraines the election of the executor. Yet admit that one creditor firſt doth begin ſuit, if others alſo after ſue before he be paid, or have judgement; now cannot the executor pay him firſt, who firſt commenſed ſuit, but he who firſt hath judgement muſt firſt be ſatisfied. And the executor may herein yeeld helpe to one before the other, viz. by eſſoignes, emplances or dilatory pleas to the one, and by quick confeſſion of the others action; for hee is not bound

41. E. 3. Fitz. Ex. 68. 6. & 7. El. Dy. 232. vide 21. H. 7. Kelw. 74.

5. Hen. 7. 27. So Walmſley inſt. P. 39. Eliz. in Error. al. Serjeants Inne.

Co.li. Intr. 269. ſuch a recovery by confeſſion is pleaded againſt another, and admitted good & fo.148, 149. Do.& S.p. 78.b.

bound againſt his will to ſtand out in ſuit, and expend coſts where the debt is cleere, nor is this covine but lawfull diſcretion, which conſcience wil alſo approve ſome good conſideration inducing. Nay after ſuit commenſed, yet untill the executor have notice thereof, he may pay any other creditor, and then plead that he hath fully adminiſtred before notice. Nor is the Sheriffes returne of ſummons or diſtres ſufficient cauſe of notice, for the ſummons might perhaps be upon his land: but if it were to his perſon, it is notice ſufficient, and then to ſave himſelfe, he muſt ſay that he was not ſummoned till ſuch a day before which hee had fully adminiſtred; yet doubtleſſe the executor may be arreſted at the creditors ſuit in ſome ſort, which yet ſhall bee no ſufficient notice of this debt. As for the purpoſe, if he be ſued by *Latitat* out of the Kings bench, this ſuppoſing a treſpaſſe gives no notice of a debt, ſo alſo of a *Subpœna* our of the Exchequer; but the originall returnable in the Common-plees expreſſeth the debt, and ſo in ſome ſort doe the proces thereupon. And therefore it ſeemes by ſome books, that if it be laid in the ſame County, where the executor dwels, hee muſt take notice of it at his owne perill. But this I take not to be Law, nor is there any great opinion that way: and although to make it more cleere, the executor in King *Henry* the fourth his time, eſtranging himſelfe from notice of the ſuit before payment to others, did alledge that the action was laid in a forren County; that is no great proofe that if his abode had beene in the County, where the action was brought, he muſt have taken notice; but thus it was cleerer, and a little ſurpluſage hurts not. Now betweene a debt by obligation, and a debt for rent or damages upon

So alſo was it ſaid Tr. 29. Eliz.

on a Covenant broken, I conceive no difference nor any priority or precedencie, but it is at the executors diſcretion to pay firſt which he will, as if all were by bond. So alſo of rents behind and unpaid as I conceive, but touching them principally intending rents upon leaſes for yeares divers conſiderations are to be had, and ſome diſtinctions to be made, as firſt, betweene rent behind at the time of the teſtators death, of which that before ſaid is to bee underſtood, and that which groweth behind after next betweene ſuit for the rent by action of debt, and by diſtres and avowry. As to the firſt difference, if the rent grew due ſince the teſtators death, then is it not accounted in Law the teſtators debt, for onely ſo much is in Law accounted aſſets to the executor as the profits of the leaſe amounted to over and above the rent, ſo as for that rent ſo behind the executor himſelfe ſtands debtor, as hath been reſolved, and therefore he is ſuable in the *Debet*, and *Detinet*, whereas for rent behind in the teſtators life, and all other the debts of his teſtator he muſt be ſued in the *Detinet* onely. Hence it muſt follow as it ſeemes, that an executor ſued for debt upon bond, or bill, cannot (except in ſome ſpeciall caſes) plead a payment or recovery of rent growen due ſince his teſtators death; though of rent behind at the time of his death it bee otherwiſe. And yet here againe another difference or diſtinction is to be taken, *viz.* where the profits of the leaſe exceed the rent, and where the rent is greater than the yearely value of the profits, for even there as elſewhere is ſhewed, the executor if he have aſſets, is tyed to the holding of the leaſe, and payment of the rent, and conſequently doth ſo much of that rent as exceeds the yearely profit, ſtand in equall

degree, the teſtators debt with other debts by ſpecialty; and yet againe to re-conſider this point, what if the debts of the teſtator by ſpecialty payable preſently at his death, or before the time that any rent can grow due upon this Leaſe, ſhall amount to the full value of the teſtators goods; may not then the executor though he doe not pay thoſe debts before the rent day (for that would make the caſe cleare) waive the terme; for if he may, then happily if hee doe not ſo, but ſhall by payment of any of this rent want goods to pay any part of the debts by ſpecialty, it may lye upon himſelfe, and his owne goods, as hapning by his owne default. But on the one ſide it may be ſaid that he could not waive it ſo long as he had aſſets, becauſe therby he ſtood equally lyable to pay that debt being once due, as the other debts by ſpecialty. On the other ſide it may be ſaid, that though the debts for rent, and upon bond, ſhall be admitted to be in nature equall, yet the caſe being put of rent not due at the time of the teſtators death, it was not then a debt nor duty, whereas a Bond makes a preſent debt, and duty, though not preſently payable, the day of payment being not yet come, ſo as this latter is diſcharged by a releaſe of debts, or duties, and ſo is not the former. So to leave that point unreſolved, let us next ſee whether in ſome caſe, though the rent exceed not the yearely value of the land, yet even that payable after the death of the teſtator may not ſtand in moſt part, if not wholly, upon the teſtators ſcore as his debt, as well as if it had beene payable before his death. *Poſito* then that the whole or halfe yeares rent is payable at the Annunciation of our *Lady*, and that the teſtator dieth two or three dayes or ſome like ſhort time before that feaſt, now certainly

tainly ſhould the Law be unreaſonable if it ſhould lay this debt upon the executors ſhoulders in reſpect of thoſe few winter-dayes profits which hee tooke. But ſurely ſince the taking of the profits induceth the Law to lay the rent upon the Executor as his owne debt; therefore as where the executor had the profits for the whole yeare or halfe yeare, except ſome few dayes incurred in the teſtators life-time: thoſe few dayes will bee unregarded according to the rule, *De minimis non curat lex*, and the whole rent ſhall lye upon the executor as his owne debt. So on the contrary part, where the whole yeare or halfe years profit except ſome few dayes incurred after the teſtators death, the rent becomming payable ſo inſtantly after the teſtators death, muſt in reaſon lye wholly upon the teſtators eſtate, as to mee it ſeemes. What if to this I adde that the teſtators cattell wherewith the ground was ſtocked doe depaſture, and devoure the profits all the time after the teſtators death, till the day of payment of the rents? Nay, if the rent were payable at *Mich.* and the Annunc. and the teſtator dieth a few dayes after *Mich.* the rent being of or neere the value of the land, it will then be hard that the executor ſhall for this Winter profit pay the rent out of his owne purſe, eſpecially if the whole yeares rent bee payable at that one day, as in ſome caſes it is; or if the whole yeares profits were taken in the Summer, as in caſe of a leaſe of tithes, it is ſo alſo of medow grounds uſually drowned in the Winter. So if the leaſe be then to end, not having a Summer halfe yeare to ſucceed, and make amends for the Winter: or if the Winter halfe yeare be the latter half, the leaſe beginning at *Lady* day, ſo that there is but a Summer for each Winter following, and not

any for the Winter paſſed. Of like conſideration with theſe is the caſe of a leaſe of woods for a rent, which being fellable but once in eight or nine yeares; now if the Leſſee, having made the laſt ſale and felling before his death, the Law ſhould caſt the rent upon the executors own eſtate for the time future, it ſhould lay loſſe upon him, which is againſt reaſon, and contrary to the nature, and diſpoſition of the Law even in this particular. As appeares by this, that ſhee enables an executor to pay himſelfe before any debt of equall nature, ſo as ſhee more tenders an executors indempnity, than any other creditors; therefore I think that with, and upon the differences above ſhewed, even rent growen due after the teſtators death, may in ſome caſes bee the teſtators debt, payable equally with debts by bond. But here I conceive that if the executor were in ſuch caſe of deſtitution of aſſets, as might juſtifie his waiving of a leaſe over-rented, he then may waive theſe termes reſidue, becauſe for the future the profits will come ſhort of anſwering the rent, though at the firſt, and ſo in the totall, the profits did exceed the rent. And if for want of waiving, where he might, this rent fall upon him, the payment thereof would bee no excuſe againſt another creditor, nor as to him be a good adminiſtration, for *Ignorantia juris non excuſat.* This is pertinent to our preſent conſideration, which debt may with ſafety be paid, leaving another unpaid; and the hazard of executors, by ignorance of the Law hath been a principall motive to my writing theſe Diſcourſes in Engliſh. Hitherto wee have onely conſidered, as I thinke, of rents, as they be recoverable by action of debt. Now let us ſee if there may not bee ſomewhat different conſiderations

touching

touching diſtraining for rent, and ſo comming to recover it by avowry. Put wee then the caſe that an executor hath fully adminiſtred in payment of debts by bond, and after the leſſor or reverſioner commeth and diſtraineth for arrerages of rent due in the teſtators life; can the executor in barre of the avowry plead fully adminiſtred, as hee might have done, if an action of debt had been brought for theſe arrerages? doubtleſſe I thinke no, nothing ſhall hinder the levying of the rent upon the land, ſo long as it is enjoyed under the title of the leaſe, except the land come to the King, upon whoſe poſſeſſion no diſtreſſe can be taken: I think therefore that the executor, who paid out of his owne purſe to the value of this leaſe (for ſo I intend the caſe, and elſe could he not have fully adminiſtred, as in the caſe was put) he ſhould, I ſay, have abated in the price and valuation of the leaſe, as well the arrerages of rent, as the rent futurely payable, both being equally leviable upon the land, and if hee ſo have done, hee is no loſer by payment of this arrerage: but if truſting to the power of an executor, and to the plea of fully adminiſtred he did not ſo, but disburſed in reſpect of the leaſe to the full value without ſuch abatement, he muſt beare the loſſe of his owne ignorance. Hee might alſo another way have helped himſelfe, *viz.* by payment of that arrerage, leaving other debts by ſpecialty unpaid. And what if ſuits were preſently commenſed upon the teſtators death, before he could make payment of the rent behind, whether might the executor then plead this debt for rent, as hee might a debt by judgement or ſtatute, and ſurely me thinkes it probable that he might, becauſe it is a debt from which he cannot bee freed by payment of the other debts

ſued for by ſpecialty. If the reverſioner would alſo commence ſuit before judgement had for the creditor by ſpecialty, then might the executor helpe himſelfe by confeſſing his action firſt; but this perhaps the reverſioner would not conceive ſafe for him, ſince that way the others might get judgement before him, and ſo he might loſe both his ſuite and his debt, whereas holding himſelfe to the courſe of diſtres, the leaſe continuing, he hath land at the ſtake, for his debt. What if he diſtraine and avow? may not now the executor pay him, or at leaſt confeſſe his action or avowry, ſo as hee firſt having judgement, may firſt bee ſatisfied. Surely after ſuit commenſed, I ſee not how the creditors by bond can ſo be prevented, at leaſt without judgement had for the rent; yea, though ſuch a judgement be had, yet becauſe the judgement in that caſe is not that he ſhall recover the ſumme due for rent, but only that he ſhall have a returne to the pound of the cattell diſtrained for the rent, it is queſtionable whether the payment thereupon of the rent ſhall prevent the judgements after had in the ſuits upon bonds. But I thinke it ſhall, becauſe although it bee not an expreſſe recovery of the rent, yet is it ſuch a judgement compulſary for the ſame, as makes the payment inevitable and of neceſſity. And where before we have made the queſtion only betweene the ſaid rent-debt, and the debt by obligation: let us now put the caſe betweene the rent-debt and the debt by ſtatute or judgement. If then the leſſor after death of the leſſee diſtraine for the rent behind part of the teſtators cattell, and after there come a writ of execution upon a judgement or ſtatute of the teſtators; whether ſhall theſe beaſts in the pound for

for rent be delivered in execution or not, admitting that without them there be not goods ſufficient for ſatisfaction of the judgement or ſtatute. And ſurely I thinke they cannot bee delivered in execution: Firſt, for that they are in the cuſtody of the Law, as in *String-fellowes* caſe, though there the Kings prerogative overtopped that poynt; yea, ſo I thinke, though they bee replevied, for that they are to bee returned to the pound, if judgement paſſe for the avowant, to which purpoſe ſecuritie is given, ſo as they are but in the caſe of a priſoner bailed, who ſtill is in ſome ſort in cuſtodie. Secondly, for that this rent incident to, and deſcendible with the reverſion, breeds a debt of a reall nature, and ſo of more dignity and worth than debts perſonall. Thirdly, for that the land let (as in a ſort debtor) ſtands chargeable with this diſtres from the very time of making the leaſe, as either by a contract reall of *quid pro quo*, or rather by an operation of law or legall conſtitution, or ancient cuſtome of the Realme, without any contract of perſons. Laſtly, for that the leſſor doth not diſtraine the cattell therefore, or in that reſpect for that they are or were the goods of the teſtator, but for that hee found them levant and couchant upon the land, which muſt afford his rent, or a diſtreſſe for it if behind, ſo as if they had beene any under tenants or ſtrangers Cattell, they might have beene diſtrained. Some may perhaps object this reaſon why theſe impounded catell ſhould be delivered in execution, *viz.* for that where otherwiſe the creditor by ſtatute or judgement ſhould loſe all or part of his debt, yet by this releeſe done to him ſhall not the leſſor loſe his rent, for that hee may at any time after diſtraine any goods or cattell

See 13. R. 2. Bro. Pledges 31. Attainder of the party diſtraind ſhall not take away the diſtres. Vide Dyer.

found upon the ground at any time during the continuance of the leaſe. But here beſides the point of delay and ſtay for this rent, which to many is the ſole meanes of maintaining their houſeholds and families ; this further is conſiderable, that perhaps the leaſe may be neere expiring, perhaps ſo highly racked and rented, even to or above the value, as that the executor having his teſtators ſtock taken from it and him by execution will not ſtock it any more, & ſo the land lying freſh, if the leſſor ſhall loſe the benefit of his former diſtres, he ſhall be perhaps without remedy for his arrerages of rent. And if the caſe were of a diſtres for rent behind after the teſtators death, I conceive though not ſo ſtrongly, for moſt of the reaſons aboveſaid, that the law would be all one as in the other caſe ; for though in this caſe reſpect ſhall not bee had to the executors loſſe upon whoſe goods the law caſts this debt, though not the other, yet here the point of loſſe muſt fall either upon the leſſor loſing his diſtreſſe, or upon the other creditor by ſpecialty or record loſing wholly or in part his debt. And in reſpect of this locall tye upon this land for payment of the rent whereto even the fealty of the leſſee and tenure of the land bindeth him, and it I think no act that the leſſee can doe by entring into bonds or ſtatutes, or having judgements againſt him can hinder the leſſor or reverſioner from taking his remedy upon this leaſed land for the rent therefore due, but rather any other creditor ſhall be a loſer in his debt. Doubtleſſe if in barre to the avowry for this rent due either before or ſince the teſtators death, the executor will plead that the teſtator was indebted a thouſand pounds, by ſtatute, recognizance, or judgement,

which

which is more then all his goods amounted unto, it will be no good plea, but may be demurred upon. What if hee plead ſo much debt of record to the Crowne? ſurely I doubt whether this plea will be allowed in any other Court then the Exchequer; yet if theſe arrerages of rent ſhall bee levied upon the land, ſo as either the executor muſt pay it or loſe the cattell diſtrained by a returne irrepleviſable, and then ſhall not have ſufficient to ſatisfie the debt to the Crowne, I ſee not how hee ſhall well eſcape, when purſued in the Exchequer to make up this Crowne debt out of his owne purſe, which is hard. For this wee may pitch upon as a *Maxime* and principle, that an executor where no default is in him, ſhall not be bound to pay more for his teſtator then his goods amount unto. Againe, it is a rule, that where nothing is to he had, *viz.* juſtly to be had, the King loſeth his right: and our bookes tells us that the Kings Prerogative muſt not doe wrong, *Poteſtas ejus juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed diaboli.* On the other ſide it may be ſaid, that if land leaſed come to the King by grant, outlawry, or otherwiſe, the rent reſerved cannot bee diſtrained for, and therefore it is not very unreaſonable nor incongruent that the Kings intereſt for his debt ſhould make the diſtres of a ſubject to ſtand by and give place. This therefore among other of the premiſſes doe I leave as a *quære*: nor is it altogether unprofitable either for an executor or creditor to know what wayes and paſſages, what caſes and contingents be doubtfull and hazardous. And if in theſe unbeaten paths where our bookes and relations have held me forth no light, expreſſe, or particular, I have erred in miſ-reſolving, or miſſing to reſolve,

Vid. *Bro.* Pledg. 31.

So Bracton.

Notreſolving.

reſolve, I hope I ſhall without difficulty obtaine pardon.

Now let us conſider of aſſumptions or promiſes made by the teſtator upon good conſideration, the performance whereof or making recompence and ſatisfaction for not performing, doth lye upon an executor as before is ſhewed. Theſe therefore are to come behinde and give place unto all the former, ſo as an executor this way or for theſe ſued may plead debts by ſpecialty, rent, &c. amounting to the whole goods. And yet theſe debts by contract or aſſumption expreſſe are to be ſatisfied before legacies be to bee had. Firſt, becauſe by the common law of the land thoſe are recoverable, and ſo are not legacies: next becauſe as our bookes ſpeake, it concernes the ſoule of the teſtator to have *æs alienum*, all duties & debts to other men ſatisfied before the debtors voluntary gifts or bequeſts. Alſo theſe debts by aſſumption or ſimple contract, are to bee ſatisfied before the reaſonable part of the wife or children, to which by cuſtome in ſome Counties they are intitled, ſee 21. *Ed.* 4. 21. & 2. *Ed.* 4. 13. & 2. *Hen.* 6. 16. And note that in ſuch an action upon the caſe it is not of neceſſity to lay or ſet forth in the declaration that the defendant hath aſſets to pay all debts by ſpecialty, and this alſo; but if there want, the defendant muſt alledge that in his excuſe, for elſe it ſhall be preſumed that hee hath aſſets. So alſo in an action upon the caſe grounded upon the executors owne aſſumption to pay his teſtators debt, and yet as the L. *Cooke* conceives, and upon good reaſon as to me it ſeemes, if the executors ſo promiſing had not aſſets ſufficient in his hands to pay this debt promiſed, hee pleading *non aſſumpſit* may give that in evidence, for then the

Co lib. 9. fo. 88. b. Doct. & Stu. lib. 2 cap. 10. & 11

Co. l. 9. fo. 90. b. Pinchons caſe & fo. 94. Banes caſe.

the conſideration faileth, as alſo if there were no ſuch debt due, ſince the plaintife could not have recovered if he had ſued, and ſo his forbearance to ſue was no valuable conſideration.

CHAP. XIII.

Of Devaſtation or Waſting.

THat which S. *Paul* of diſpenſers ſpirituall who are as it were the executors of the laſt will and teſtament of our Saviour Chriſt doth ſay or enjoyne, *viz.* that they muſt bee found faithfull; The ſame is required of theſe leſſe or inferiour diſpenſers, the executors of mens Wils, and hereof they are to bee regardfull, not only in reſpect of eſcaping damage to their owne eſtates, but more eſpecially in reſpect of an oath which divers of our bookes mention to be taken by executors. And in one of the bookes of relations of caſes in the twentieth yeare of *Hen.* 7. his time, there is an expreſſion of three things whereto the office of an executor tyeth him. 1 To doe truly, and thereto are they ſworne, ſaith this booke. 2. To be diligent, *viz.* with ſedulity to attend the diſcharge of the truſt. 3. To doe lawfully; nor well can this latter bee without knowledge what is lawfull or required by the law. Now what is formerly ſaid of the right method and order of paiment of debts, diſcovereth in much part how and by what wayes an executor may waſte and miſpend his teſtators goods, and conſequently incurre a devaſtation, and ſo make his owne goods liable, but of that more fully and particularly

particularly by it ſelfe, and herein we will conſider of theſe parts.

1. What ſhall be ſaid to bee a waſting or devaſting, and how many wayes that may be done.

2. Who ſhall by this act be charged to yeeld recompence.

3. Who ſhall take the benefit or advantage of it.

4. How farre or in what meaſure the advantage ſhall be taken.

5. What way or by what meanes it ſhall be had.

As to the firſt, this waſting is done divers wayes. 1. by the executor his plaine, palpable, and direct giving, ſelling, ſpending, or conſuming the teſtators goods after his owne Will leaving debts unpaid. 2. By paying what is not to be paid, which yet is to be underſtood where there are debts payable and unpaid. 3. By the way formerly diſcourſed of, *viz.* the not obſerving the right method and order of payment. 4. By aſſenting to a legatees having a thing bequeathed, debts being unpaid. 5. By ſelling goods of the teſtators at an under-value, for bee the appraiſement what it will, and let him ſell for what hee will, hee muſt ſtand charged to the beſt and utmoſt value towards the creditors. Yet if upon a judgement againſt the teſtator or the executor, the Sheriffe ſell ſome of the teſtators goods at an undervalue, this is no vaſtation of the executor, for this difference *Hody* chiefe Baron makes. But ſince an executor may happily prevent this act of the Sheriffe by paying the due ſumme upon ſale of the teſtators goods at the beſt value or otherwiſe, he is to be blamed to leave it to the conſcience of the Sheriffe or Underſheriffe rather. 6. And laſtly this may be done to the executors ſmart by undue, *viz.* not legall diſcharging of any debt

or

or duty pertaining to the teſtator, and that divers wayes requiring heedfulneſſe. As if an executor upon a bond of two hundred pounds forfeited for payment of a hundred pounds accept the principall, or perhaps alſo ſome uſe, coſts, or damage, and give a releaſe or acquitall of the whole forfeited bond, or of all actions, or upon record acknowledge ſatisfaction upon judgement had. This is a waſting of ſo much as the penall ſumme is more then is received, & ſo farre his owne goods ſtand liable to creditors not ſatisfied; and ſo doubtleſſe is it if hee doe but give up the bond having no judgement upon it, though he neither make releaſe nor acknowledge ſatisfaction. But his verball agreement to require or ſue for no more, or his giving a note, of receipt for ſo much as hee hath received, or delivering of the bond into a friends hands, or into a Court of equity in way of ſecurity to the debtor that he ſhall not bee ſued for more, is no devaſtation, ſince ſtill the reſt in law remaines due and ſuable. So this ſets no more upon the executors ſcore then hee received. But let him take heed of releaſing except he bee ſure there bee no other debts demandable. Nor only is there danger in releaſing of debts, but of treſpaſſes or other cauſes of action alſo. As if one take away goods from the teſtator or from his executor; If the executor make him a releaſe, this is a devaſtation, and makes his owne goods lyable to the whole value of the goods releaſed, as appeares by *Ruſſels* caſe, where the releaſe of an Infant executor to one who had taken and committed to his uſe Jewels and goods of the teſtator being pleaded, the releaſe was therefore held void in reſpect of nonage, for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made

13. E. 3. Fitz 91

Yet on the otherſide, if an execut. by payment of a 110. pounds, get in a forfeited bond of 200 pounds, it ſhall be an adminiſtrat. but of 110. pounds, 27. *H.* 86. p. Fitz. inſt.

made the executors owne goods lyable, which his infancy considered had beene hard. Another way of discharging, dangerous to executors, is submitting matters of debt or duty, or touching goods taken away to arbitrement. For if by the award of the arbitrators the debtors or wrong doers be discharged or acquitted without making full recompence, the rest of the value will as to other creditors sit upon the executors skirts, because it was their voluntary act thus to submit it to arbitrators. Thus may executors fall under prejudice, not only by wilfull wasting or unfaithfull miscarriage, wherein they are not to be pittied, but through incogitancy and unskilfulnesse also. Nay, I may say truly that it is very hard for executors in some cases to walke safely: For besides that to find out all judgements and recognizances by or against their testators, is of some difficulty more then for statutes, whereof by search in an Office descry may be had; yet with this difference, that statutes marchant, and statutes staple may be and stand effectuall against executors, though not inrolled, albeit against purchasers of the conusors land they be not of force, if neglect be of inrolement within three moneths. But where statutes or recognizances lye for performance of covenants upon sale or lease of lands, marriage, agreements or otherwise; how hard is it for executors to know whether any covenant be broken or not; how hard to be sure they finde out all bonds, bills, covenants, and articles in writing made and kept by others, whereby any money is due and payable before debts by contract or legacies: as also all promises or debts by contract payable before legacies: For the law hath prescribed no time for their claime and demand

demand, and whether ſome ſuch thing or meane of publication were not fit to be enacted, let the judicious conſider. To attaine to this knowledge of the teſtators debts, I remember that it is by the Lord *Brooke* reported, that in King *Henry* the 8th his time, Sir *Edmund Knightly* being executor to Sir *William Spencer*, made Proclamation in certaine Market Townes that the creditors ſhould come by a certaine day and claime and prove their debts, but he for this was committed to the Fleet and fined. For that none may make proclamation ſaith the booke, without warrant or authority from the King, except Majors and ſuch like Governours of Townes, who by priviledge or cuſtome may ſo doe. But the dangers are only where there is not ſufficient of the teſtators goods and chattels to ſatisfie both debts and legacies. For where there is ſo, the executor is not in any ſuch hazard as aforeſaid. This deſcry of danger may breed caution, and *Qui timent cavent & vitant.*

As to the ſecond we ſhall have in conſideration two ſorts of perſons, *videlicet*, 1. His executors, there being many times divers executors, and the waſte or devaſtation done but by one. Next his owne heires, executors, and adminiſtrators, *videlicet*, whether he dying, this act ſhall fix upon them, like charge and burthen for ſatisfaction, as upon himſelfe ſhould have lyen in caſe he had lived.

Touching his companions though all together make but one Executor, yet the misdoing of one ſhall not charge the reſt, nor make their goods liable to recompence : as both appeares by the Booke of entries, and was alſo held in the time of *Henry* the ſeventh, Anno 12. of his raigne. Yea, of

Lib. Intra. fol. 327. Kelw. rep. fol. 23.

So.11.H.6.38 a.4. El.Dy. 210.a.the writ ſo iſſued againſt the waſter only P.4.H.8.rot. 303.

of the ſame opinion were the judges twice in the late Queenes time, *viz.* firſt in a caſe betweene *Walter* and *Sutton*, in the common place, and ſhortly after in the Kings Bench in a caſe between *Hankeford* and *Metford*; though theſe two caſes be not reported in Print. And ſurely this ſtands with rules of reaſon or juſtice, that each ſhould

Tr.34. Eliz. Paſ.36.Eliz.

beare his owne burthen: If it were otherwiſe, many would decline, and abandon executorſhips as very dangerous to the moſt honeſt, and faithfull, in caſe they were ſubject to wracking by the miſcariage of their Colleagues.

As for the Executors, or Adminiſtrators, of the waſting Executor dying before he have borne the burthen of his miſ-doing; I have found contrary opinions even in the late Queenes time. For firſt in the *Exchequer* it was conceaved to be as a treſpas dying with the perſon, as comming within the rule, *Actio perſonalis moritur cum perſona*. But

Mich.31. & 32. Eliz. Tr.34.Eliz.

in the ſaid caſe of *Walter* and *Sutton*, the court of common plees was of contrary opinion, *viz.* that this was not eſcaped by the death of this miſdoer, but the law would purſue his Executors or adminiſtrators, and lay upon their backes the burthen of recompence or ſatisfaction; for that the teſtator or inteſtate doing this wrong had made himſelfe to be debtor in the firſt teſtators ſtead, and therefore they who repreſent his perſon muſt with his goods make amends, and ſupply; And this latter opinion was ſomething in time after

Tr.34.Eliz.

the former. Alſo betweene theſe two times was there an opinion in the ſaid Court of common plees agreeing in part with this latter: For there

Mich. 32. & 33.Eliz.

a judgement being had againſt an Executor, and the Sherife upon the *Fieri facias*, returning that there were no goods, of the Teſtator in the Exe-

cutors

cutors hands, and then this Executor dying: A *Scire fac.* upon a ſuggeſtion of devaſtation by the ſaid Executor deceaſed was awarded againſt his Executor, and that upon good debate, and ſhew of a *Preſident* left, and reported by M. *Ienour* in King *Henry* the eight his time. And it was then ſaid to have beene cleare, that if a devaſtation had beene returned in the life time of the ſaid *Waſtfull* Executor, his Executor then ſhould have beene charged. All the doubt was for that heere that was not done in his life time, yet at laſt affirmatively (as above is ſhewed) the reſolution was.

Touching the third point, *viz.* to whom the advantage of waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting Executor. Put wee the Caſe that the Teſtator ſtood indebted to *A.* by Statute, and to *B. C.* and *D.* by ſpecialty, not of record, as Bond, Bill, *&c.* and the Executor having no more in aſſets then only that hundred pound, and this all being due to *D.* hee payeth him the whole hundred pound not having any thing left to ſatisfie any of the reſt of of the Creditors: hereby wrong is done to none but *A.* who was a Creditor by Statute, and therefore hee onely ſhall make this Executor to pay the like ſumme out of his owne goods, ſince as to him only this is a devaſtation, or that it was his election, to pay of the other Creditors; which hee would, no ſuit being commenſed by any of them; conſequently no wrong was done to *B.* nor *C.* And if no ſuch debt had beene by Statute but all had beene Creditors by ſpecialty, and *A.* onely had commenſed ſuit, and that knowne to the Executor, now if after hee payed all to *D.* hee ſtands only as to *A.* liable in his

owne goods, and not to *B.* nor *C.* But if the Executor had only paid a legacy or debt by contract, leaving nothing for ſatisfaction of the debts by ſpecialty, then had he ſtood equally liable to each of the other Creditors. *Capiat qui capere poteſt, viz.* hee who firſt could recover, or by the voluntary act of the Executor, could obtaine payment, muſt be preferred: if the ſumme would reach no further. For it ſhall by this miſ-payment, or miſ-converſion ſtand with the Executor, as if hee had not payed it nor departed from it at all upon the matter, and therefore I doubt not but it is free for him to give the advantage of this his error, to which Creditor by ſpecialty he will, ſo as he ſhall ſtand free from all the reſt, no ſurpluſage remayning, nor any Creditor of record being. For if there be any debt upon record, the Executor ſued by a Creditor upon bond may notwithſtanding this his waſting plead in Barre of this ſuit; that there is ſuch a record of a debt not ſatisfied, and that hee hath no more then that debt amounts unto, and ſo admit ſo much ſtill in his hands as he hath miſadminiſtred, though in kind it be not in his hands, but miſpent, or unduly payed, as aforeſaid. And what is before ſhewed of the Statutes precedency before Bonds, in taking the advantage againſt an Executor for devaſting or waſting; the ſame is to bee underſtood of precedency of judgements before Statutes, and debts to the King before judgements, &c.

If upon fully adminiſtredpleaded to one vel aliter, he have the advantage of this vaſtation, taking up the whole ſum waſted, quæ. how the executor ſhall relieve himſelfe againſt another.

As touching the fourth point, *viz.* how farre the Executor thus waſting ſhall incurre dammage or make his owne goods liable: Doubtleſſe no further then the value of the Teſtators goods waſted or miſ-adminiſtred. Therefore if one have advantage thereof to the full ſumme, no

other

other after ſhall, for he is no further a treſpaſſer or wrong doer, nor is the teſtators eſtate any further, or deeplyer damnified. And as damages for treſpaſſe are to bee proportioned to the value of the wrong done, and loſſe ſuſtained: So alſo in this caſe the executor by his miſdoing, doth not draw upon himſelfe his Teſtators whole debts, but ſo much only as the goods amounted to, which he did miſ-adminiſter, and which ſhould have gone to the payment of the teſtators debt, if he had not ſo miſguided himſelfe in the office of executorſhip, which default he muſt repaire or make good. And this proportion ſeemes to me proved, by the caſe in King *Edward* the third, where the value or quantity is found, eſpecially of the goods adminiſtred wrongfully; though there by a wrongfull perſon, and in *Suttons* caſe, it was expreſſely held that each executor ſhould anſwer for ſo much as he waſted. 41. E. 3. 31. b.

Now for the fifth, and laſt point, *viz.* how and in what manner reliefe ſhall bee had upon this point of waſting, for him to whom it pertaines, firſt, this is to be obſerved, that in caſe where the verdict paſſeth directly againſt the plaintife, no devaſtation can come in queſtion, for that no judgement being for the plaintife, no writ of execution can iſſue, and therefore, if upon the iſſue of fully adminiſtred, it ſhall appeare that there hath been a devaſtation which cauſeth aſſets to faile, then muſt the Jury find that the defendant hath aſſets, and not find a devaſtation, as was reſolved in the Kings Bench in the late Queenes time betweene *Hankeford* and *Metford*, for there the Jury finding a devaſtation, *viz.* a ſurrender of a leaſe for yeares, left by the teſtator, it was held void, and nugatory, and was not regarded by the Paſ. 36. El. in 6. reg.

Court, which ſaid that muſt come in by the Sherifes returne, *viz.* upon the *Fieri fac.* Thus aſſets being found in the executors hands, judgement is given for the plaintife to recover his debt, and to have it levied of theſe aſſets; nor is this finding of them by a jury againſt truth, though they bee waſted, and ſo not to be had in kind: for the executor hath them in right, ſince he hath not rightfully parted from them according to the rule, *Pro poſſeſſore habetur qui dolo (or injuria) deſiit poſſidere.* As in the caſe firſt put, this waſting cannot come in queſtion for want of a judgment for the plaintife, ſo alſo where the judgement it ſelfe extendeth to the executors owne goods by reaſon of ſome falſe plea, whereof we ſhal after conſider, for ſince that the conſequence, and effect of a vaſtation is but to make the executors owne proper goods liable to the debt of the creditor, this is altogether needleſſe where the judgement it ſelfe hath laid hold on his goods. But now in caſe where the judgement extends onely to the teſtators goods in the executors hands, let us find the way to releeve the creditor, in caſe the teſtators goods be waſted by miſadminiſtring or otherwiſe, for hereabout the right way hath often been miſſed, and againe eaſily may be. In the latter end of the late Queenes time this courſe was taken, *viz.* The Sheriffe returning generally that the executor had no goods, a ſurmiſe was entred that the executor had converted to his owne uſe the teſtators goods, whereupon a writ was awarded to the Sheriffe to enquire thereof by jury or enqueſt; which he did, and returned that it was found that the executor had waſted the goods; and thereupon a *Scire facias* was awarded againſt the executor, to ſhew cauſe why execution ſhould not

45. El. Pettiers caſe.

Co. lib. 5. fo. 32.

be

be of his owne goods, and upon two *Nihils* returned, execution was ſo awarded, but a writ of error was hereupon brought. And although it were ſaid for defence of that courſe, that it was uſuall in the Common Pleas, and more favourable than the other courſe, where the Sheriffe only returneth the waſting, or is ſole Judge thereof, whereas here it was found by an inqueſt of Jurors, and thereupon a *Scire facias* awarded; yet did the Court reſolve the contrary, and reverſe this execution as erroneous: For it was ſaid that upon the Sheriffes return of *Nulla bona, viz.* that there were no goods of the teſtator to bee found, the plaintiffe ſhould have a ſpeciall writ of *Fieri facias*, willing the Sheriffe to levie the ſumme recovered, either of the goods of the teſtator, or if it could appeare that the executor had waſted the teſtators, then to levie it of his owne goods; and this way, as was ſaid, the executor hath good remedy by action againſt the Sheriffe, if without juſt cauſe he levie it of his goods; but the other way, *viz.* When inqueſt is thereupon taken, the remedy failes, ſince neither Sheriffe doing according to the inqueſt, can bee puniſhed, nor the Jurors finding falſely are ſubject to any attaint, it being no verdict upon iſſue joyned, but an inqueſt of office, which excludeth alſo all challenge of Jurors. And whereas that book mẽtions the Sherifes ſubjection to action only in caſe of his miſ-feaſance or doing wrong, I cõceive that he is likewiſe ſuable for omiſſion or nonfeaſance in this caſe, *viz.* for not levying the debt upon the executors own goods where proof is made of his waſting. And where the book mẽtions this *Fieri facias* to be in this manner upon the Sheriffes returne in a *Sciri facias*, doubtleſſe the book therein is miſ-printed, and ſhould be a *Fieri facias*, for

So 9.H.6.f.9

See Paſton 11.H.6.16. 36. upon ſurmiſe that *A* hath waſted, *A Fieri facias* may iſſue againſt his goods only. If ſo, &c. So. lib Inr. fol. 11.

Co. lib. 5. 32.

in a *Sciri facias* the Sheriffe can returne nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the course there prescribed, that first a generall *Fieri facias* goe out, and that thereupon the Sheriffe returne generally that the defendant hath no goods of the testators, and that thereupon the said speciall writ is to issue; yet in the beginning of the late Queenes time the verdict passing for the plaintiffe upon the issue of fully administred, the Sheriffe was not permitted to make such a generall returne of no goods to bee found of the testators, but was inforced by the Court upon good advisement, either to levie the debt, or to returne a *Devastavit*; and so was done at last by the Sheriffes of London much against their minds; and thereupon went out a writ to leavie the debt of the executors owne goods, first in London, and after into Devonshire, upon a *Testatum* that the executor had goods there: and it was there said, that if no goods could bee there found, then the plaintiffe might have a *Capias* to take the executors body in execution, or an *Elegit* for the moiety of his lands. But certainly I cannot find (except with a difference) how this course of inforcing the Sheriffe to doe one of these two can be just; as neither could Justice *Fulthorp*, in the time of King *Henry* the sixth, approve it. For a Jury of one County may finde assets in another County, as was resolved in the time of King *Henry* the eight, which yet was understood of goods moveable, and not of lands. This then thus being, if a Jury of Kent find assets which be in London or Essex, how can the Sheriffe of Kent, where the action was laid, leavie the debt recovered by or out of these goods; or since hee cannot, why should

2. El. D. 185. Woodw. and Chichesters case.

11. H. 6. f. 28.

38. H. 8 Dy. 3. Yea, Co. lib. 6. f. 47.

46. Assets in Ireland, or else-where beyond the sea, may bee found by the Jury where the action is laid.

ſhould he be compelled to make a falſe returne of a waſting, when the goods remaine unſpent and unwaſted in another County? Why rather ſhould he not be ſuffered to returne according to truth, that there is nothing within his County or Bayliwick whereof the debt may be levied, ſince even his oath tieth him to make a true returne, nor is this contrary to the verdict, finding aſſets generally, and this ſo returned upon a *Teſtatum*, the proceſſe may be directed into the right County. But in the laid caſe it was replied to the plea of fully adminiſtred that there were aſſets in Eſſex, the action being laid in Middleſex, and yet as it ſeemes by the booke, the triall was to be by a Jury of Middleſex, which, ſaith the book, may find the aſſets in Eſſex; but there the plea was demurred upon, and held a good plea, which proves that although the tranſitorineſſe of the aſſets make them ſubject to the notice of a forren Jury, yet is it not like an act tranſitory and not locall, for that muſt be pleaded to be done in the place where the action is laid, though in truth not ſo. But had iſſue beene joyned upon the point, mee thinkes it ſhould be tried in Eſſex, where the aſſets be laid, the rather for that perhaps they may be reall chattels, *viz.* lands leaſed to the teſtator, or other lands of him appointed to bee ſold for payment of debts, which as heretofore hath been held, a Jury of another County cannot find. Beſides, although ſuch a forren Jury may find other moveable aſſets, yet is at their election, they are not thereto compellable, as elſe-where is holden. Here then may be the difference, *viz.* that if the aſſets be found to be in the County where the triall is, there the Sheriffe of that County cannot returne *Nulla bona*, without adding that the execu-

For the pl. may if he will ſuggeſt, the being of aſſets in a forren Countie, and this is uſually done. See lib. Intr. 11. a. Action upon the caſe for a falſe return of Devaſtat. contra ſacr. ſui debitum, 28. H. 8.

2. Ma. Bro. Attaint. 104. and 10. El. Dyer. 271. Becauſe local & fixed, otherwiſe held, 3. Jac. in com. b. Co. lib. 6. f. 46, 47. 22. E. 4. 9. and 9. Ma. Bro. Att. 104. 18. H. 7. Kelw. rep. 51. a. So held P. 31 El. in ſcac. car. 31. El.

So if the proces for execution goe into another County, than where the verdict found as the diff. was held in Scac. 31. El. 28. H. 8. Dy. 30. b. Pas. 4. H. 8. rot. 303. 4. El. Dy. 219. But 2. H. 6. 12. without any Sci. fac. upon the devast. returned, a capias was awarded by the Court; and see 9. H 57. Bro. Ex. 57. & lib. Intr. 323. A Fieri fac. absolutely, and without condition. 8 9. H 6. 49. 50. A manu-script report. 36. H. 6. f. 3. & Mordant 12 H. 7. Kelw. rep. 24. but Vavasor Just. and all the other Serjeants è contra. 2. El. D. 185.

tor hath wasted: but if there be no verdict at all touching assets, judgement passing against the executor upon a demurrer, confession, *Nihil dicit*, or the like; there may the Sheriffe make such a returne of *Nulla bona testatoris*, without returning any devastation; and so also where the verdict either findeth assets generally not finding in what place they be, or expresly findeth them to be in another County, as a little before wee found, may be done by a Jury of London, of assets in Essex.

In King *Henry* the eight his time, as a little after the said case of *Chichester*, is by the Lord *Dier* reported, the Sheriffe returning upon the *Fieri facias*, that the executors had no goods of the testators, did adde in the same returne that one of the two executors had wasted, and thereupon a *Scire facias* was awarded against him, and upon *Scire feci* returned, and default made, execution was adjudged, and awarded against his goods onely, and this course of *Scire facias*, both the Lord *Dier* (as else-where I find it reported) and *Prisot temp. Hen. 6.* approved. But I am perplexed with doubt what plea the executor comming in upon the *Scire facias*, could plead, for except his deniall of wasting might bee pleaded contrary to the Sheriffes returne, and put in issue so as to cause a new triall after a former perhaps preceding judgement, which I thinke would not be admitted, then his comming in is to little purpose for ought I can conceive. Here againe it must be observed that in the case of *Chichester*, the judgement was had upon triall of fully administred, but in the other case in the time of King *Henry* the eight, it was upon confession, which is all one, as I take it, with condemnation upon *Demurrer*, or *non sum informatus*,

informatus, or triall upon *Non eſt factum* the Bond or a releaſe to the Teſtator or the like. Now betweene all theſe, and that of *Chicheſter* there is a broad difference, for there the defendant being convinced by verdict to have aſſets, which if they continue not in his hands, in kind, muſt be anſwered out of his owne goods as waſted, therefore the *Fieri facias* to levie the debt of the teſtators goods, if any found or in default thereof out of his owne goods is very agreeable, and purſuant, but in none of the other caſes is there any ſuch triall or conviction of the defendants having aſſets, ſo as it reſts *æque dubium*, whether they have aſſets or not, and therefore it may ſeeme ſomewhat hard, and harſh to ſend out ſuch a writ in that caſe, and ſo ſhould I have thought, if I had onely ſeene the report of *Pettifers* caſe; But looking into the record, and finding the condemnation there to be by *Nihil dicit*, in effect I cannot uphold any diſtinction of courſe in reſpect of the ſaid difference of caſes. Nor indeed doth that courſe there directed preſume that the executor either hath aſſets, or hath waſted them, but commands that if aſſets, &c. then the levying ſhall be one way; if waſting, then another way, ſo if neither *Nihil fiend.*

Co. lib. 5. fol. 31. Mich. 41. Eliz. rot. 2441. Co. lib. Intr. 269. b. A recovery of debt precedent was pleaded: Pl. replyed null tiell record, & def. would not maintaine his plea. Ideo condemp. he muſt ſo returne and do nothing.

If neither,

CHAP

CHAP. XIIII.

Of an Executor of his owne wrong.

TO begin with ſome definition, or deſcription of this man; He is ſuch as takes upon him the Office of an Executor by intruſion, not being ſo conſtituted by the teſtator or deceaſed; nor for want of ſuch conſtitution ſubſtituted by the ordinary to adminiſter, Touching whom we will conſider in theſe parts, and with this method, *viz.*

1. What acts or intermedlings of ſuch an one not being executor nor adminiſtrator by right, ſhall make him to become an executor by wrong. *vide* 5. more perſtat. 43. *E. cap.* 8.

2. In what manner, and by what name ſuch ſhall be ſued, ſpecially when another then is executor or adminiſtrator or himſelfe after ſuch act becomes adminiſtrator.

3. What acts done by him ſhall ſtand firme, as if he had beene an executor by right.

How farre he becomes liable to creditors, and how, and to whom. 5. See a late ſtat. 43. *El. cap.* 8. hereabout.

2. And 2. P. & M. ſod. Dy. 105. b.

As to the firſt, it was in the time of Queene *Mary* doubted, and not reſolved whether the onely ſeiſing, and taking into ones hands the goods of the deceaſed did make one executor of his owne wrong without any further act. And in the beginning of the late Queenes time the Lord *Dyer* ſaid that the poſſeſſion, and occupation of or medling with the goods is that which gives

2. El. Dy. 166. & 167. So alſo Balkn. 50. Ed. 3. 9.

gives notice to Creditors, whom they are to ſue as executor. But doubtleſſe Creditors muſt looke further before ſuit, for elſe can they not know whether he ſo intermedling be executor or adminiſtrator, nor conſequently how to found their ſuit rightly, and ſafely for good ſucceſſe, ſince a ſuit againſt an executor as adminiſtrator, or againſt an adminiſtrator as executor, will prove ruinous, and fall to the ground. Yea where an adminiſtrator ſued as executor did not plead that adminiſtration was committed unto him, but generally denyed that hee was executor or adminiſtred as executor, the Lord *Dier* held that it muſt bee found for him, yet left it doubtfull: but the cleere and ſafe way had beene to have pleaded the adminiſtration. &c. And in the former caſe the Lord *Dyer* ſaid, that one intermedling only about the funerall, and laying out money therefore; an overſeer or conductor, or he who hath Letters of the ordinary *ad colligend. viz.* to get and keepe the goods in ſafety, and one who intermedleth by vertue of a will truly made, but controlled by a latter will after found & proved, may free himſelfe from being an executor of his owne wrong by ſpeciall pleading how or in what right he intermedled, and traverſing his adminiſtring in other manner, and that this traverſe need not, nay may not be; was held in the time of King *Henry* the 6th. and 7th. for that ſuch acts amount not to any adminiſtring at all: and where no adminiſtring at all is confeſſed: ſuch a traverſe of not adminiſtring in other manner is diſſonant, and not legall. But let us looke back upon theſe ſeverall points exempted by the Lord *Dyar*, and wee ſhall ſee ſome cautions neceſſary touching them, and their ſafe entertainment, firſt

13. & 14. El. Dy. 305. 306.

1. Eli. D. 166. & 167. ſee lib. Intra. f. 322. b.

21. H 6. 28. 10. H 7. 28. Yet lib. Intra. 322. b. where he confeſſed about funerall he traverſed aliter. Lib. Intra. 322. where by letter ad collig. Hee traverſed; Abſq; hoc quod & exec.

as touching the point of burying the dead, it muſt be underſtood to be with ſome expence of the deceaſeds goods, and ſo it is expreſſed in the ſaid Booke of *Henry* the 6th. his time : elſe for a man out of charity, to lay out of his owne money (not intermedling with the goods of the deceaſed) to bury a friend, hath little colour to involve him ſo doing in an executorſhip by wrong : taking the caſe then that ſuch perſon layes out or expends of the deceaſeds goods or money upon his funerall, heed muſt be taken touching the meaſure, and proportion whereabout, though I can give no particular, and diſtinct lymit, yet doubtleſſe either meere neceſſity, *viz.* Church duties, &c. or at leaſt decent ſutableneſſe to his quality muſt bee the bounds. And herein to ſpeake as I think, this latter muſt either bee utterly excluded, or held within very narrow compaſſe, for what reaſon that a Knight or man of higher quality leaving (though perhaps entayled Lands of good value) yet goods not ſufficient to pay his debts, ſhould have hundred pounds or more of that which ſhould ſatisfie Creditors ſpent in pompous interring of him for his worſhip, and reputation ? next overſeers may only bee excuſed for ſeeking to preſerve, and keepe the Teſtators goods not in caſe they expend or diſpoſe thereof. So alſo for him who is autorized by the Ordinary to Collect, for if he ſell or diſpoſe of any (though goods otherwiſe ſubject to periſhing) it makes him an executor by wrong, as was reſolved in the late Queenes time, notwithſtanding that by the ordinary Letters, he was expreſly directed or warranted ſo to doe, for it was ſaid the ordinary himſelfe could not ſo doe. As for him who adminiſtred by vertue of a will after diſproved or controlled

21. H. 6. 28.

Lib. Int. 312 8. and 9. Eli. Dier. 255. 256. He ſold bleuded corn, but there he pleaded not the ſpeciall matter.

controlled by a latter, Hee muſt not doubtleſſe ſtand free, for the goods before adminiſtred, but either as rightfull or wrongfull executor ſtand lyable to the Creditors. Nor doth every ſuch intermedling by one out of all theſe excuſes, and evaſions, as would bee an adminiſtration, make one an executor by wrong. If one doe but take an horſe of the deceaſed, and tye him in his Houſe or Stable, this makes him not an executor, ſaith *Paſton* a juſtice; So of like acts or intermedlings, as he that delivers to the wife of the deceaſed her apparell, at leaſt if it be no more then is convenient to her degree. But if ſhe take, or another deliver more then ſuch to her, ſhee or he becomes an executor by wrong: But now let us come to a difference, where there is a rightfull executor, and a will by him proved, or adminiſtration committed, for there ſuch light acts or intermedlings ſhall not make one an executor by wrong, as where there is no other of right to be ſued. As if one take goods wrongfully from ſuch a right executor or adminiſtrator; This (though he convert them to his owne uſe) makes him not an executor by wrong, but a treſpaſſor to the rightfull executor or adminiſtrator, who even for theſe goods once Aſſets in his hands ſtands lyable to ſuits of creditors, they being neither lawfully evicted nor rightly adminiſtred: But in caſe there had beene no executor at that time, or no Will proved nor adminiſtration committed, then ſuch taking of the deceaſeds goods into a ſtrange hand had made an executorſhip by wrong. And thus was the difference lately reſolved, as is reported by the Lord *Cooke* in the caſe betweene *Read* and *Carter* in the Common Place.

1 And 2. P. & Ma. Dyer. 105

21. H. 6. 28.

33. H. 6. 31.

1 Eliz. Dy. 166.

Tr. 37. Eliz. by Fenner Juſt. If one doe any ſuch act as puls the property out of the executor, hee is become an executor by wrong.

If the goods be alienes by fraud, he who takes them after the executors death is an executor by wrong. Tr. 37. Eliz. L. 5. E. 4. 72. a. Tr. 2. Jac. in com. b. Co. lib. 5 33. & 34.

Yet this further difference was there held, *viz.* that

that although there be an executor or administrator by right, yet if a ſtranger take upon him to receive debts and make acquittances, or to pay debts claiming to be an executor, he is ſuable as an executor by this act: and ſo alſo in the late *Queenes* time was held by 6. Juſt. as touching the receipt of debts and making acquittances, but the booke mentions not whether any other executor then were, or not. But in the point of bare payment of debts Frowick makes another difference, *viz.* If a ſtranger doe with his owne money pay the debts of a friend deceaſed, and not with the debtors: This is but an act of charity, and makes him not an executor by wrong, otherwiſe, if with the debtors money. Yet to this another difference muſt be added, *viz.* that if hee thus paying with his owne money, have taken into his own hands goods of the deceaſed; then is his payment preſumed as by or out of the value of theſe goods, and ſo makes him an executor by wrong. Contrarily, if hee have no ſuch goods in his hands. And in the point of intermedling with and diſpoſing of the teſtators goods where another executor is; this further difference is to be added or underſtood, *viz.* That where the goods ſo taken never came actually to the executors hands, but were in a remote place, there this taker becomes executor. For as it were miſchievous to the executor if he ſhould by a poſſeſſion in law caſt upon him ſtand chargeable with theſe goods in remote places purloyned as aſſets in his hands; ſo were it as miſchievous to creditors; if neither executor by right, nor this ſtranger as an executor by wrong ſhould ſtand lyable to creditors for them. It is true that the right executor may ſue and recover damages for them, and that ſo recovered

ſhall

1. El. D. 166. b.

H. 20. 7. 5.

ſhall be Aſſets ; but the creditor hath no meanes at the Common law to inforce him to ſue, and perhaps it may be a cold ſuit. And with theſe additions I thinke that late reſolved difference may ſtand firme and ſound. Yet in former times without ſuch difference the taking only and poſſeſſion of the goods of the deceaſed, was held to create an executorſhip by wrong, as *Belknap* ſaid in the time of King *Edw.* 3. and eſpecially if the act were ſuch as removed the property out of the right executor, as Juſt. *Fennar* in the late *Queenes* time ſaid, *Teſte meipſo.*

50 Ed. 3. fo 9. Tr. 3. Eliz.

How and by what name ſuit ſhall be againſt ſuch, and the like.

TOuching the ſecond point, *viz.* in what manner ſuit ſhall be againſt ſuch: Firſt in generall, this uſurping executor is not in ſuit to be diſtinguiſhed by name from the right executor, but to be ſued generally by the name of executor, of the laſt Will and Teſtament of the defunct, and then if hee will deny himſelfe ſo to bee, hee muſt plead, that he neither is executor, nor hath adminiſtred as executor: Then the plaintife muſt prove that hee hath adminiſtred in ſome ſuch or the like ſort as aforeſaid. And it hath beene divers times held, that where there is a right executor, and yet another doth adminiſter by wrong, it is at the election of Creditors either to ſue them joyntly together, or one or both of them ſeverally and by himſelfe. But if where adminiſtration is committed, another alſo adminiſters by wrong, theſe cannot be ſued together as adminiſtrators; for though one may be an executor by uſurpation or wrong, yet none can come to bee an adminiſtrator

2. *Point.*

L. 5. E. 4. 72. Co. lib 5. 30. 31. & 33. b. 21. H. 6 8. Co. li. Intra. 144 but 145 a. in the verdict he is called Exec. De injuria ſua propria. 39. H. 6. 45. 46. 21. H. 6. 8. 19. 9. E. 4. 14. 15. 1. & 2. P. & M. Dy. 165. 33. H. 6. 38. 25. H. 6. 31.

ſtrator by wrong, ſince no other but ſuch as receiveth that power from the Ordinary can ſo bee; therefore in that caſe there is a neceſſity of ſuing him a part and by himſelfe (who ſo uſurpeth adminiſtration) by the name of an executor. So if *A* adminiſter the goods of *B.* not being executor nor adminiſtrator, and after his ſuch doing and diſpoſing of the goods he obtaineth adminiſtration of the goods of *B.* but the goods left or comming to his hands ſince the adminiſtration committed ſuffice not without the other debts received or releaſed, or goods ſold before, to ſatisfie creditors. Now if any ſue *A.* by the name of adminiſtrator, hee ſhall have no further relief then according to the value or extent of the goods left in or come into his hands ſince the adminiſtration committed, and if thoſe be fully adminiſtred, he ſhall get nothing. If they remaine unadminiſtred, but amount not fully to his debt, hee muſt want ſo much of ſatisfaction. And if he will bee releeved or ſatisfied out of the goods before diſpoſed of, hee muſt ſue *A.* as executor of *B*: and ſo was it ruled and reſolved by *Gawdy* and *Suit*, Juſtices in the Kings Bench in the late *Queenes* time, *viz. Tr.* 30. *Eliz.* And if this now adminiſtrator will plead in abatement of this action, that adminiſtration was committed to him, and demand judgement if ſuit ſhall be againſt him as executor. Then the plaintife muſt in this replication as I take it, ſet forth the ſpeciall matter, *viz.* how the defendant did adminiſter before adminiſtration to him committed. But if one to whom adminiſtration is committed do devaſt, and this adminiſtration is by ſuit repealed, becauſe he was not the next of kinne, an adminiſtration is committed to another; now a creditor who would

2 R. 3. 20.

21. H. 6. 8. If the adminiſtration were commited before the ſuit began, the writ ſhall abate, elſe not, as was of old conceived.

would be relieved out of the goods wasted, must sue that first as administrator, and not as executor of his owne wrong, said *Popham* Chiefe Justice, for hee did rightfully administer for that time.

As for the third, *viz.* how farre this executor of his owne wrong, becomes lyable and obnoxious to suit; consider wee these things; first hee becomes subject both to the action of the executor who hath right to the goods wrongfully intermedled withall by him though it were before proving of the will, and also to the action of the creditor who hath right to the satisfaction of his debt. Secondly, as touching the measure how farre he is ingaged, doubtlesse hee is not by his wrongfull administring beecome chargeable with the whole account of the testators debts, but only so farre, and with so much thereof, as the goods which he so wrongfully administred amount unto, (Yet he must looke to his plea, else by it hee may draw all sued for, upon himselfe, as if hee deny his being executor or administrator.) and this seemes to mee proved by the case in the time of *Edward* the third, where the inquest found not only the administring or intermedling by the executor wrongfully, but found also by direction of the Court (as it seemeth) what the value was of the goods so wrongfully administred, which had not beene materiall, if the administring of a penny had made one as farre Chargeable as the administring of a pound. Besides, if it bee so that a rightfull executor wasting goods of the testator to the value of twenty pounds, shall bee no further charged than

3. *Point.*

How far liable to creditors.

Co. lib. Intr. 144. 145. Plus debet.

that value; then doubtleſſe ſo ſhall it bee alſo in this caſe, for both be wrongfull adminiſtrations: only this difference there is betweene them, that in one caſe the adminiſtration is by a wrong perſon, and in the other caſe in a wrong manner.

1. El. Dy 167 cap. 12. Nay, the Lord *Dyer* doth not ſtick to call him, who adminiſtreth wrongfully, or in undue manner, expreſly an executor by wrong, in the caſe of *Stocks* againſt *Porter*, though hee were rightfully executor, becauſe he did diſpoſe or execute wrongfully.

4. *Point.* What acts of his of force. As to the fourth, *viz.* what acts done to him or by him who is an executor of his own wrong, ſhall ſtand firme and good, as done by or to the right executor. Suppoſe, firſt, that the deceaſed were indebted to him twenty pounds who thus uſurpeth executorſhip, whether may he pay himſelfe or not? And this point was in debate in the Kings Bench betweene *Coulter* and one *Ireland*, executor of *Hunt*, where it was ſtrongly objected, that notwithſtanding the rightfull executor or adminiſtrator might puniſh him, and recover againſt him for the goods which he adminiſtreth; yet another creditor ſuing him as executor generally, and ſo affirming him to be (for there is no ſpeciall forme of writ or declaration to diſtinguiſh an executor by wrong from a rightfull executor) he ſtands as againſt him in the ſtate of a rightfull executor, and therefore may firſt pay himſelfe before he pay others; and of that mind at the firſt were *Fenner* and *Gawdy*, Juſtices, yet did they admit that this payment ſhould not ſtand good, as againſt the rightfull executor or adminiſtrator. And *Popham* and *Clinche* held ſtrongly that neither ſhould it ſtand good againſt other creditors, for then every man would ruſh upon the teſtators goods

M. 40. 41. Eliz. Co. lib. 5. f. 30.

goods and bee his owne carver in payment: And whereas it was ſaid at the barre, that the Lord *Anderſon* upon an evidence at Guild-Hall had ruled it otherwiſe, *Popham* at another day of debate of the ſaid caſe, related that the L. *Anderſon* did deny that he ever ſo ruled, or was of that opinion; and further informed that both he and Juſtice *Walmeſly*, *Periam* and *Clarke*, Barons, did agree with *Popham* and *Clinche* in opinion, After which, Juſtice *Gawdy*, as alſo *Fenner*, if I miſtake not, changing their opinions, and concurring with the reſt, judgement was given accordingly. In the the debate of this caſe, queſtion was made, if ſuch an executor by wrong pay a debt to another creditor by ſpecialtie, whether this ſhall not ſtand firme and good, ſince he ſtands lyable to creditors ſo farre as the goods by him adminiſtred doe amount, and it was agreed by the better opinion at leaſt that this ſhould ſtand firme & good, ſo as if the payment were out of his owne goods, he might retaine to himſelfe in liew thereof ſo much of the goods of the teſtator, for here he doth not, as in the other caſe, advantage himſelfe by his owne wroug. Yet that opinion allowing this payment to creditors muſt, as I thinke, bee underſtood with this difference, *viz.* that this payment ſhall ſtand as againſt other creditors, but not as againſt the right executor or adminiſtrator, for then any ſtranger might uſurpe the office of executor, and take from him that liberty and election to preferre which creditor he will in firſt payment; yea, might take from the executor power to pay himſelfe before other in caſe there were a debt due to him, which were very unreaſonable.

Of addition and alteration by the ſtatute 43. Eliz. cap. 8.

5. *Point.* WEe having conſidered what the Common law is, and willeth in the premiſſes Let us now ſee what alteration or addition a late ſtatute hath made. In the laſt Parliament of the late Queene *Elizabeth*, conſideration being had of ſubtill getting into mens hands goods of an inteſtate by deed of gift, or letter of atturney from one of ſmall or no ability to whom ſuch ſubtile contriver hath procured adminiſtration to bee committed, and ſo himſelfe would ſtand free from the ſuit of Creditors, the adminiſtrator himſelfe either not being to be found, or not being of any valew to ſatisfie Creditors. It was therefore enacted that every perſon, receiving or having any goods or debts of any inteſtate, or any releaſe or diſcharge of any debt or duty belonging to him upon any fraud as aforeſaid, or without conſideration of or neere the value (except in ſatisfaction of ſome juſt, and principall debt to the value of the goods or debts due from the inteſtate) ſhall bee charged as Executor of his owne wrong ſo farre as the value of thoſe goods, and debts amount; deducting all principall juſt debt to him due, and payments by him made, which a lawfull Executor ought to have paid. Heere have wee a touch of all the parts precedent, or at leaſt three of them.

1. Wee have firſt a new Executor by wrong though intermedling under the title of an adminiſtrator.

2. Wee have a limit of the charge by him incurred ſutable to our former expreſſion.

3. Laſtly

3. Laſtly, we have to him an allowance of debts owing to himſelfe or duly paid to others, which is more then wee have conceaved allowable to another Executor by wrong.

CHAP. XV.

Of pleas by Executors, and which be beſt, which moſt prejudiciall to them.

SInce amidſt the Plees pleaded by Executors there is ſuch difference as that ſome induce one kind of judgement, ſome another, ſome drawing more loſſe, and burthen upon Executors then others: Let us conſider of the differences, ſo as light may be taken to chooſe the ſafeſt or fitteſt for each caſe.

Plea; denying the Executorſhip. 21 H.6.19. 20. Bro. 62. 2. E.4.f.4. 1.9 H.7 15.

If an Executor doe utterly eſtrange himſelfe from the executorſhip; ſaying that hee was never executor nor ever adminiſtred as executor (for that muſt bee added) then if iſſue be taken upon this plea, and it be found againſt him; the plaintiffes ſhall have judgement to recover not damages only, but even the debt it ſelfe out of the proper goods of the Executor, if none of the Teſtators can bee found to ſatisfie it. And this ſhall bee thus not only where it is found that the defendant was made Executor by the will, and and proved it, and ſo could not chuſe, but know it, but even alſo where hee had never proved the will whereof hee was made Executor, nor ever adminiſtred by vertue thereof: yea though hee did before the Ordinary refuſe to be Executor of

Lib. Intr. 322. 333 33 H.6.33. 34

this will, or to intermedle with the execution thereof; yet if any other named Executor with him did prove the will, or did not refuse to bee Executor, let such other refuser take heed of pleading that plea. For truth is against the first part of his plea, *viz.* that hee never was Executor; and so the verdit which must be *veritatis dictum*, must needs passe against him, and make his owne goods lyable as well to debt as dammages. What if no other were made Executor but this onely who refused before the ordinary, may he safely plead that hee never was executor? I thinke not, since hee so was executor before his refusall, that he might have released all debts due to the Testator, and given away all his goods, therefore I thinke hee must plead specially shewing his refusall, and not generally deny his being Executor.

Hee was suable as soone as the Testator was dead.

Nay admit he never was once named, made or intended to bee made executor, yet having pleaded this Plea, that he never was executor nor administred as executor, if it shall be found by verdict that he did administer or intermedle as executor, the same blow or burthen falleth upon him, for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by his administring he became an executor of his owne wrong, and the deniall of this executorship by wrong or usurpation shall bee as penall to him as the deniall of a rightfull executorship. The like Law where the executor pleades a release made to himselfe, or a payment of the debt or other performance of the condition made by himselfe. Nay I find in this latter case the judgement entred generally against the defendant, as against another, for his owne debt, not being executor. And the reason

But if he did it as Adm. it is otherwise, yet see that specially pleaded Co. Lib. Intr. 148. a.

See Co. Lib. Intrac. Judgm. so entred. fol. 145. b. Read & Carters case.

reaſon why the Law makes theſe ſo penall to an executor is, becauſe his Plea is not onely falſe, but the falſehood thereof was wilfull, ſince it muſt of neceſſity be knowne to himſelfe to be ſo. And laſtly for that all theſe Pleas, if they had proved true, had beene perpetuall barres at leaſt againſt the defendant, the firſt indeed had not beene a barre againſt another being in truth executor or adminiſtrator. But if the executor had pleaded a releaſe made to his Teſtator, finding ſuch an one among his writings which yet was either forged or never both ſealed and delivered by the plaintife as his deed, or if he plead payment made by his Teſtator, neither of theſe Pleas found againſt him ſhall cauſe the judgement to faſten upon his owne goods, ſo if he denyed the Bond or Bill, whereupon the Sute is grounded, to be the Teſtators deed. For in all theſe caſes the truth being not knowne to him, he might honeſtly, and reaſonably conceive it to be as hee did plead. But what if he plead fully adminiſtred, and this bee found againſt him, which reſted in his owne knowledge? ſhall not this falſe Plea expoſe his owne goods in defect of his Teſtators to the ſatisfaction of this debt? no it ſhall not, for that though this were a falſe plea, and that within his owne knowledge, yet was it not a perpetuall bar, for if it had beene ſo found as was pleaded, yet aſſets comming after to the hand of the Executor, the plaintife ſhould then have reliefe, and ſatisfaction out of theſe ſince accrued aſſets. If any ask how aſſets may after come, I will give him two or three inſtances. Firſt, it may bee by recovery of debts before withholden, or of dammages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment

Co. Lib. Intr. 29. a. not firſt de bonis teſtatoris ſi, &c. *See* Bro. Ex. 22. theſe reaſons for this diff.

33. H. 6 13. 24.

So of other perform. Co. Lib. Intr. 133. a. 6 E 4 1. 7. E. 4. 8. *See* Bro. Ex. c. 22. that the Book contrarily reported 34. H. 6. 22. 23. is erroneous, as was deſcryd by Fitz. & al. 23. H. 8 the Record being not ſo as the Booke ſaith the judgement was.

ment was not come. Secondly, if the Teſtator having a leaſe for twenty yeeres did demiſe the ſame to *I. S.* for the whole terme, if hee ſo long ſhould live, if he were alive in time of the former verdit, but now is dead, the terme continuing, this is now aſſets which before was not, whilſt it was but a poſſibility of a terme. Other inſtances might be given, but theſe may ſuffice. If the Executor pleaded that the Teſtator ſtood bound in ſuch a Statute, or that there was ſuch a judgement againſt him of debt to the K. beyond the ſatisfaction whereof the goods would not reach: This is in effect a fully adminiſtred, though ſpeciall, and not generall, and the Law is alike (as I take it) in all theſe caſes as to the not making of the Executors goods lyable. But in all theſe cauſes though the debt ſhall not bee adjudged upon the Executors owne goods, yet the damages ſhall, in default of the Executors goods to ſatisfie them. And in theſe caſes it is not materiall whether the judgement paſſed upon triall or demurrer Nay if the defendant Executor plead no plea, but confeſſe the action generally, or be condemned by *Non ſum informatus*, the judgement is the ſame, *viz.* to record the debt onely out of the Teſtators goods, and the damages of the Executors goods in default of the Teſtators, what if the executor defendant, confeſſe that he have aſſets to the value of part of the debt, not of the whole; there for ſo much as is confeſſed the plaintife may pray, and have judgement preſently without dammages, and may maintaine for the reſidue of the debt that the defendant alſo hath aſſets for the reſt, and ſo goe to tryall, as appeares both by the Printed Booke of entries, and another manuſcript which I have; But what if this triall paſſe againſt the plaintiffe?

Lib. Intr. 148. 149. This good though the judg. were by non ſum inform. & no averment that it was without covin. Co. Lib. Intr. 152. 11. *H.* 4. 5. There a cap. ad ſat. was awarded for the damma. ges.

But he may I thinke forbeare ſo to doe, and to the judgement for part ad that when more aſſets come he ſhall have more. Lib. Intracion. Fol. 223.

plaintiffe? Shall hee then have an additionall judgement for damages in reſpect of the former? I thinke he ſhall have coſts, which commonly run, with or in the name of damages, but without a writ to enquire of damages, none being found by verdicts, the Court doth not uſually adjudge damages: yet in the Book of Entries I finde 6s. 8d. damages aſſeſſed by the Court upon a confeſſion in a writ of *Rationab. parte bonorum* againſt executors, and this hath much affinity with the action of debt. Yea, in the very action of debt where the *Iurors* for miſcariage after their departure from the Barre were fined, I find that the plaintiffe renouncing the aſſeſſment of damages by them made; and praying the Court to aſſeſſe the ſame, it was done accordingly, but this was a ſpeciall caſe. fol. 542. M. 28. H. 6 Ro. 321. Lib. intra. 329. a.

Whereas we before ſhewed that an executor denying his executorſhip, ſhall if it be found againſt him, pay the debt of his owne goods for his falſe plea; This thereabout occurreth to be added, *viz.* that that is onely where the immediate executorſhip of the defendant is denied. For if *B.* be made executor by *A.* and *B.* dying makes *C.* his executor; now if *C.* be ſued for the debt of *A.* as Executor of *B.* Executor of *A.* and he denieth that *B.* was executor of *A.* which by conſequence is a deniall of his being now executor of *A.* yet if this fall out in triall againſt him, hee ſhall not in his owne goods ſtand lyable to this debt; becauſe it is poſſible that he might not know to whom his teſtator was executor. So if *A.* made *B. C.* and *D.* his executors, and *E.* is ſued as executor of *D.* the ſurviving executor of *A.* if *E.* deny that *D.* his teſtator ſurvived *B.* and *C.* by conſequence whereof he denieth the truth, *viz.* that the executorſhip of See lib. Intr. 322.

of *A.* is devolved to him, yet ſhall not this found againſt him, charge his owne goods, for he might be ignorant of this point in fact, *viz.* whether *B. C.* or *D* lived longeſt. And here he denied not his owne immediate executorſhip, but a mediate or more remote executorſhip; and ſo I think is the law where *C.* being ſued as executor of *B.* executor of *A.* he pleads that *A.* by a latter teſtament made himſelf executor which is found againſt him, ſo as here he falſly pleaded, and pretended himſelf to be the immediate executor of *A.* and ſo denied the mediate executorſhip, *viz.* of *B.* to *A.* and of him to *B.* yet *Quære* of this, for why ſhould not as well his falſe making himſelfe an executor immediate to the indebted teſtator charge his owne goods as well as his falſe denying of that executorſhip; ſince both plees tend to the overthrow of the plaintiffes action, and each equally reſted in the defendants knowledge. But this difference is betweene them apparant, *viz.* that the deniall of executorſhip, if true, is an utter, and perpetuall Barre to the plaintiffe, as againſt him ſo pleading; but the affirming of an immediate executorſhip, where he was ſued as executor mediate, doth not ſo if true, but directs the plaintiffe to a better writ or action, *viz.* againſt him as immediate executor to the indebted teſtator.

Where wee have before touched upon the comming of aſſets futurely to executors, I thinke it not amiſſe to conſider a little the forme and frame uſuall in pleas of fully adminiſtred, which thus runne, *viz.* *Quod die impetr. & plene adminiſtravit omnia bona & catalla quæ fuerunt præd. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. præd. S. temp. mortis, &c.* Lib. Intr. 151.

Thus tying his deniall upon the things which were

were the teſtators at the time of his death. What if then the executor have at the time of this plea pleaded goods, which were not the teſtators at his death, but ſince accrued, as before is ſhewed, or perhaps a leaſe for yeares ſold by the teſtator upon condition to be void, if five hundred pounds not paid at ſuch a day, which hapning after the teſtators death and default made, the terme returneth; Or if the executor by a writ of error reverſe a judgement given againſt his teſtator for two hundred pounds, and ſo is reſtored thereunto: May the plaintiffe now reply generally that hee hath aſſets which were the teſtators at the time of his death: How can the Jury ſo finde, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a preſident of a ſpeciall plea therein. But in reaſon me thinkes it ſhould be ſpecially and not generally pleaded and ſet forth in the replication. And in caſe where one ſued as executor, denieth that he was ever executor or adminiſtred as executor; I find ſometimes the replication generall, that hee did adminiſter without ſhewing wherein or how, and ſometimes ſpeciall, ſhewing what thing was adminiſtred and where. Here note, that the executor defendant denying (as he muſt) two things, *viz.* 1. That he never was executor; 2. That he never adminiſtred as executor, the plaintiffe in his replication is tyed to maintaine but the one of them as the truth of the caſe is; that is, if in truth the defendant were made executor, but never did adminiſter, now it muſt be replied that he was made executor at ſuch a place, without ſpeaking any thing of his adminiſtring. On the other ſide if he did adminiſter, but were not made executor, then only the adminiſtring is to be replyed; but if it ſhall be found that

7. H. 4. 39. Bro. 50. This plea is not good per cur. becauſe ſome may have ſince accrued.

Lib. Intrac. 322. a. b. but a place muſt be ſhewed. So 21. H. 6. 19, 20. Bro. 62.

So done Co. lib. Intr. 144. b.

that the defendant had administration to him committed, ad so administred by vertue thereof, then is the verdict to passe for the defendant, for this is no administring as executor, and upon a generall deniall thereof this may be given in evi-

Mich. 13. & 14. El. Dy. 305.

dence, as the Lord *Dyer* reports to have been resolved. But if the plaintiffe doe in his replication maintaine both the points, shall this make his plea double? Me thinkes it should, yet I find it so replyed, and no exception taken for the doubleneſſe. *Tr.* 17. *H.*8. *Rot.*28.

Lib. intra. 322. b. Tr. 37. Eliz.

A sole woman being executor, maketh a deed of gift of the testators goods in trust, but continueth possession of them and marrieth *I. S.* who also hath possession of the goods, and in an action of debt by a creditor fully administred is pleaded: now upon evidence the verdict shall passe for the plaintiffe; for this alienation being fraudulent was void as to all creditors, and so as to the plaintiffe the goods continued the testators, and so assets in the defendants hands, as was held in the Kings Bench. If fully administred bee pleaded where the defendant hath assets for part, but not sufficient for all, and so it is found, yet shall not judgement be given for the whole, but for part presently with a further award, that when more shall come to the executors hand, the plaintiffe shal then have further judgement for the rest, so as that false plea doth him no prejudice, but makes him in as good state, the charges of triall excepted, as if hee had confessed himselfe to have part. And I thinke the plaintiffe upon that confession of part may pray the like judgement, without maintaining that the defendant hath sufficient for the rest; for if that be not true, why should he bee put to the charge of a triall by Jury? yea,

Yet Finch. 46. E. 3 f. 9, 10. held the contrary, viz. that judgement should be of the whole, but execution only for so much, and a Scir. fac. for the rest when more assets.

Sir

Sir Edw. *Cooke* at the Barre, *Tr.*36. *Eliz.* ſaid, that where fully adminiſtred is pleaded, the plaintiffe is not tyed to maintaine the contrary, but may preſently pray and have judgement to recover it when aſſets ſhall futurely come to the defendants hands, which was denied by ſome; but truly me thinks the Law ſhould be as he ſaid, as well as in the former caſe, where for the part which the defendant had not aſſets to pay, it ſo was done upon verdict ſo finding. But there, as I conceive, it was not a preſent judgement, but an award that hee ſhould have judgement futurely; ſo as after when aſſets come to the defendants hands, the plaintiffe muſt have a *Scire facias* againſt the defendant, to ſhew cauſe not why hee ſhould not have execution, but why he ſhould not have judgement, as I take it, yea, where it is found for the defendant, that hee hath fully adminiſtred, yet was it held by all the Juſtices, 33.*H.*6.23,24. and by *Priſot*, 34. *H.*6. 24. that when aſſets after come to his hands, the plaintiffe ſhall have a *Scire facias* to have ſatisfaction out of them, but there *Markham*, *Telverton*, and *Forteſcu*, were of contrary opinion, and ſo was the whole Court, 4.*Hen.*6. *fol.*4. And it ſtands with great reaſon, that whereupon a verdict fully found againſt the plaintiffe, judgement is given *Quod nihil capiat per breve*, there he cannot have any writ to execute the judgement for him, but is put to a new action of debt; yet where it is found that the defendant hath aſſets for part of the debt, but not ſufficient for the whole, there it is very congruous that the plaintiffe have preſently judgement for part, and after when more commeth, then by *Scire facias* againſt the defendant obtain judgment and execution for the reſt; for here both verdict and judgement were for the plaintiffe

See Co. lib. 8. fol. 134.

So 19. H. 6. f. 37. 8. E. 4. fol. 24. See judgement ſo entred.

Co. lib. intr. 151. b.

So 7. E. 4. f. 9.

plaintiffe againſt the defendant, whoſe plea, that he had no goods, was falſe, and ſo found by the Jury. And this difference was ſtrongly avowed by Serjeant *Hanham*, *Mich.*33,34. *Eliz.* and after approved by *Fenner Iuſt.*36.*Eliz.* none contradicting it, yet a booke was cited, that the plaintiffe recovering ſo much as was found in the executors hands ſhould bee amerſed for the reſidue, which *Popham* Chiefe Juſtice denied to be law.

It is 21.H.6. 40, 41.

CHAP. XVI.

Where judgement ſhall be againſt the executors owne goods, though no plea of the defendant nor vaſtation doe ſo occaſion, and of the ſeverall manners of judgement in ſeverall caſes.

HOw by waſting, called by us commonly, a *Devaſtavit*, an executor may draw downe the execution upon his owne goods, hath formerly been handled and diſcourſed of, as alſo what kind of pleas doe make the executors owne goods lyable to the debt, and what not. Now let us ſee where without miſ-adminiſtring or miſpleading, yet the nature of the action ſhall lay the whole debt or thing recovered upon the executors owne goods. And this we ſhall find in ſome few caſes; 1. Where an executor is ſued for rent behind after his teſtators death, upon a leaſe for yeares, made to the teſtator, and by him left to his executor. Here it ſhall be adjudged and levied upon

upon his owne goods, for that ſo much of the profits as the rent amounted to ſhall be accounted as his owne goods, and not his teſtators, therefore is he to be ſued as well in the *Debet* as in the *Detinet*, where in other caſes he is not, but in the *Detinet* only being ſued as executor. So if any thing delivered to or detained by his teſtator come to his hands, and he ſtill detaines the ſame after the demand, and bee thereupon ſued in an action of detinue, for this is his owne act, nor in this caſe need he to be named as executor, for he ſhall not anſwer damages for his teſtators detaining. So if hee aſſume to pay a debt of his teſtators having aſſets, and bee ſued upon this *Aſſump.* the which debt is to be recovered in damages, and that upon or out of the executors owne goods, yet is this action & the aſſumption, which is the groũd therof, founded in the executorſhip, and his having aſſets, for if either hee had not been executor, or if he had not aſſets at the time of the promiſe, it had been *Nudum pactum*, and would not have bound him, nor given good cauſe of ſuit. Nay, to goe further, in the caſe of aſſumption by the teſtator, and ſuit againſt the executor, thereupon we find the judgement in M. *Plowdens* Commentary given againſt the executor generally, as if hee had not bin an executor, not fixing it upon the teſtators goods, yet there the very debt it ſelfe is included in the damages. But contrarily was it after in the ſeventh year of the late King, *viz.* judgement given, that as well the damages as the coſts ſhould be levied of the teſtators goods, if ſo much in value of them were in the defendants hands; and if not, then the coſts only of the goods of the executor. And this ſurely is the righter and more juſt way, for there is no reaſon, that upon a promiſe

5. Mariæ fol. 182.

Reade and Norwoods caſe. Co. lib. Intr. fol. 1, 2.

miſe, more than upon a bond, the Law ſhould caſt the whole debt upon the back and ſtate of the executor. But perhaps the two judgements may bee reconciled thus, the later was given upon a verdict *Non aſſumpſit*, being the iſſue, and there the Jury aſſeſſed damages in certaine, *viz.* two hundred fiftie three pounds with the coſts. So as here the judgement was compleat and full, *viz.* to recover the ſaid ſumme, but in the other caſe the judgement was had upon a demurrer, ſo as the damages not being known, it was generally that the plaintiffe ſhould recover his damages againſt the defendant. *Sed quia neſcitur quæ damna, &c.* becauſe it appeareth not to the Court what the damages were, therefore a writ was awarded to enquire of damages, upon the returne whereof executed, the judgement was fully and compleatly to be given of a ſumme in certaine, which ſecond judgement it appeares not by the book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the ſaid firſt judgement before damages enquired of, is not a plenary and full judgement, but an award of judgement hath been divers times reſolved, and that therefore any defect and inſufficiencie in the declaration may bee ſhewed time enough after the firſt, and before the ſecond judgement. Yea, if the plaintiffe die before the ſecond judgement, though after the firſt the action falleth to the ground: So if the defendant die, otherwiſe of death after full judgement. But this notwithſtanding, and howſoever it there were done upon the ſecond judgement, me thinks it were righter and fitter that the firſt judgement ſhould expreſſe that the damages ſhould be had and levied out of the teſtators goods, for whom and in whoſe right the executor is ſued.

Tr. 30. Eliz. Paſc. 33. Eliz. in com. banc.

An-

Another caſe there is wherein the judgement muſt be, as it ſeemes, againſt the executors owne goods, *viz.* in an action of covenant for a breach of covenant ſince the teſtators death; for ſo was it held both by all the Judges of Common Pleas, except the Lord *Dier*, and by the pregnotaries in the late Queenes time, where the caſe was of an houſe upon the leaſe negligently burned in the executors time, for which damages onely were to be recovered. And ſometimes where the executor himſelfe is ſo to beare the burthen, I finde the Judgement entred, that the ſumme recovered ſhall bee levied of the lands and goods of the executor.

So for rent behind ſince the teſtators death. Co: lib.5.fol 31. the ſuit is in the debet as for his owne debt. M.14. & 15. Eliz.

Lib. Intra. 329.a.& b. De terris & catallis, &c.

CHAP. XVII.

Of women covert Executors.

THere being two kind of perſons who have ſome diſability upon them, *viz.* *Femme* coverts, or married women and infants, touching whom we find in many places queſtion and diſceptation in our bookes: Wee will conſider of them by themſelves, or apart from others, yet not joyning them together neither, but each by himſelfe ſeparately.

Firſt therefore of *Femme* coverts, touching whom we will conſider theſe three things:

Firſt, whether they may make Wills and executors, with or without their husbands aſſent, and how, where, and in what caſes. 1.

Secondly, whether they may be made executors without their husbands aſſent, or how their husbands may hinder it. 2.

3. Thirdly, what acts in execution of the executorſhip they may doe without their husbands, or their husbands without them.

Sect. 1. A woman married, or femme covert, we know is *Sub poteſtate viri, cui in vita contradicere non poteſt*, as ſaith the writ given by the Law to the wife for recovery of her land after her husbands death, being aliened by him. Therefore it is that Judges, when a woman is to acknowledge a fine of any land, doe examine her apart from her husband, to know whether ſhee be willing, or come to doe it by the compulſion of her husband: It is therefore hard for her to have freedome of will, and conſequently freedome to make a Will. Beſides, all her moveables or goods perſonall, which ſhee had at the time of her marriage, otherwiſe than as executrix or adminiſtratrix, are by the law totally deveſted out of her, and ſetled in the husband as fully *ipſo facto* upon the very marriage, as any other that were his owne before: Of theſe therefore ſhee can make no diſpoſition, no more than of other her husbands goods. But in caſe ſhee doe by will bequeath them, although the will and gift be void, yet if the husband, as the caſe was in the time of *Edward* the ſecond, doe after his wives death conſent to this her will and gift, by delivering of the goods bequeathed after her death, or aſſenting that the legatee take them by vertue of ſuch will and gift; this amounteth to a new gift by the husband. If a woman have a leaſe, an eſtate by extent, a wardſhip, the next avoydance of a Church, or other chattell reall; theſe are not deveſted out of her into her husband by marriage, but in caſe ſhee over-live him, they continue to her as before, no alienation or alteration having been made by the husband, who had power

Sola & ſecreto examinata.

Debts except which are not properly good.

5. Edw. 2. Fitz. deviſe. 24.

power to diſpoſe of them by gift in his life-time, though not by his will; yet ſuch a woman in her husbands life-time could not of or for theſe things, without her husbands aſſent, make an executor or Will, but ſhee dying before him, they would, by the operation of law, accrue to him. And here then obſerve a caſe, though not frequent, yet full of miſchiefe when it happens: Suppoſe that a woman indebted a thouſand pounds, and having leaſes and moveable goods to the value of three thouſand or foure thouſand pounds, marrieth with *I. S.* and then dieth before the debt bee recovered againſt her: in this caſe the husband ſhall have and goe away with all this value of his wife, and is not in law lyable to pay one penny of her debts, becauſe he is neither her executor nor adminiſtrator: What the Chancery could doe, or rather what the Lord Chancellor or Lord Keeper would doe in this caſe, I will not take upon mee to ſay or determine. Another ſort or kind of goods, or rather intereſts a woman may have, *viz.* debts or things in action, which as the former are not deveſted out of her by marriage into her husband, nor yet can ſhee thereof make an executor without her husbands aſſent, although they be one degree farther from the husband, than the ſaid chattels realls, for that though the husband doe overlive the wife, he ſhall not bee intitled to them as to the former: But if his wife make him executor, as ſhee may, or if after her death he take adminiſtration of her goods, then as he is thereby intitled to them, ſo is hee lyable alſo to pay her debts out of the ſame, when he ſhall have received them.

During her life he is, but not after.

But the husband may receive them or releaſe them.

12. H. 7. f. 22. The husband was ſued in Spirit. Court as executor to his wife. So ſhe is often to former husband and to father, &c.

Laſtly, *Dato*, that a woman convert is executrix to ſome other perſon, and in that right hath

goods moveable; theſe are not deveſted out of her, becauſe ſhee hath them not meerely to her owne uſe, but as repreſenting the perſon of another: But whether then may ſhee without her husbands licence or aſſent in reſpect of her being an executor, and for continuation of this executorſhip make executors, and conſequently a will or not? Hereabout hath beene much diverſity of opinion: Some bookes generally ſpeake that the wife may make an executor, but ſpeake nothing of the husbands aſſent, whether neceſſary or not.

39.H.6.f.27. Elſe-where we find it mentioned, that if the husband after the wives death countermand (ſome bookes falſe printed ſay command) the proving

34.H.8.S. Bro.Teſtaments 21. of his wives will, then it loſeth all force, or becommeth void and of no value: but in this caſe is no mention in what ſtate this wife ſtood *viz.* whether ſhe were executor or not, no nor ſo much as whether ſhee had any thing in action or chattell reall or not, ſo as nothing in particularity can

18.E.4.f 11 Vavaſor Inſt. be grounded upon that caſe. But there are expreſſe opinions that the husbands aſſent is abſolutely neceſſary even in this caſe, ſo as without it the wives making an executor ſhall be meerely void, and conſequently, hee to whom ſhe was executor, ſhall now by her death be dead inteſtate. And of this opinion was *Babington*, chiefe Juſtice in the

4.H.6 f. 31. beginning of *Henry* the ſixt his time: Yet contrary hereunto was the opinion of *Fineux* chiefe Ju-

12.H.7.24.b ſtice in the time of King *Henry* the ſeventh, *viz.* that where the wife is an executor ſhee may alſo

Tit. Diviſ. f. 27. make a will and an executor without any conſent or aſſent of her husband. And to this opinion doth Maſter *Perkins* after conſideration of the

Hill 29. Eli. in Com Ba. bookes on both ſides incline. But ſome will ſay that ſince all this in the late Queenes time this hath

hath beene contrarily reſolved, *viz.* in the caſe betweene *Andrew Ognell* plaintiffe, and *Vnderhill* and *Apleby* defendants, in the end of which Caſe, it is in expreſſe termes ſaid to have beene then reſolved that a Femme Covert or married woman, could not make an Executor without the conſent of her Husband. To this I anſwer that this Caſe is to be conſtrued with relation, *Ad materiam ſubjectam, viz.* to the matter, and point in queſtion, and under conſideration; which was that ſtate of a woman whereof we have before ſpoken, *viz.* one having things in action debts or duties to her belonging, as therein particular it was arrerages of rent due to the woman before marriage. As for the point of a woman executor to another perſon, it was never in that Caſe, under diſceptation, no nor once mentioned in the debate or arguments thereupon. Now conſidering the veryforme, and phraſe of judgements at the common Law, which are thus, *viz.* *Ideo conſideratum eſt per Curiam, &c.* not *Adjudicatum eſt*, that is, it is conſidered by the Court, not in expreſſe termes, that it is adjudged: This I ſay well obſerved (as to me it ſeemes very remarkable) gives us to know that no more is adjudged then is conſidered of, the judgement being contained, and claſped up in the word *Conſideratum eſt.* Wherefore ſince in *Ognells* Caſe, the point of a woman coverts ability in Caſe where ſhe is an Executor; To make a will, and Executor hath not beene conſidered of the eyes, tongues, nor thoughts of the Judges, being not once ſet upon it; It cannot be, that that point is there reſolved or adjudged. Beſides, even in a few words expreſſing as to me it ſeemes, the reaſon of that reſolution, it appeares not to have beene the intent of the

Cook lib. 4 51. b.

Judges, that the ſame ſhould reach or extend to this Caſe, of a woman covert executor: for it is added (as the reaſon of the judgement in my conceiving) that the adminiſtration of the wives goods doth of right belong to the husband, which amounts to this in my underſtanding. *viz.* that where the wives making of a will, and conſequently of an executor, may be prejudiciall to her husband, and prevent him of ſome benefit or advantage, or tend to his loſſe, and diſadvantage, there it ſhall not bee available or effectuall without his aſſent, and therefore not in the Caſe of her, who having debts or duties to her due, would by making another to be her Executor exclude or preclude her husband from that benefit, which to him ſhould pertaine as adminiſtrator of her goods. Now as for the goods debts or credit to her as executor to ſome other pertaining no benefit could redound to the husband, by having ſuch adminiſtration of his wives goods, for thoſe ſhould goe, and be to the next of kinne of the wives Teſtator taking adminiſtration *De bonis non adminiſtratis* of him, if ſhee have no Executor, and therefore her making an Executor as touching theſe brings no hurt or prejudice to her husband, and ſo is out of the reaſon of *Ognells* Caſe. Since then it is ſo, and ſince the Law favoureth wills, and it was by implication part of his will who made her Executor, that ſhee ſhould have power to continue his Executorſhip by making another to ſucceed therein after her deceaſe for performance of his will; why ſhould the Law give to the Husband who can receave no prejudice thereby, power to give impediment thereunto; for *Fruſtra eſt inutilis potentia*, even reaſon it ſelfe frames, and awards againſt him in this Caſe a

Quare

Quare impedit, or rather a *Non impediet*, as to me it ſeemes. Wherefore to conclude, I take it that the opinion of *Fineux* is good Law in that point of a feme covert Executor, though not in the other point, where ſhe only hath debts, or things in action to her ſelfe due, for therein the ſaid reſolution in *Ognells* Caſe, grounded upon good reaſon, gives me ſatisfaction to differ from *Fineux*, who making no difference between the caſes held the Husbands aſſent needles in both. *Poſito* then that the wife of *I. S.* having debts due to her ſelfe and being alſo Executrix to *I. D.* makes without her husbands aſſent, *I. N.* her executor, and dyeth, what ſhall we now ſay? ſhall we ſay, that as touching the goods, and credits, or things in action to her as executrix of *I. D.* pertaining this will ſtands good, and *I. N.* as her Executor may prove it contrary to her huſbands will; and that as to the credits to her ſelfe in her owne right pertaining, the will is voyd, and thereof her husband may take adminiſtration? Shall ſhe dye both teſtate, and inteſtate with a will, and without a will? ſhall ſhee have both an executor, and adminiſtrator? why not? to ſeverall purpoſes aſwell as where an executor is made onely for one particular thing or one place, the Teſtator may elſewhere dye inteſtate: and ſo where the executorſhip is divided, as before is ſhewed, and one to whom part is committed will prove the will, but the other to whom other part of the executorſhip is committed will not take it upon him, here muſt needs bee a dying for part teſtate, and for part inteſtate. Note.

As for the ſecond point, *viz.* wives or women coverts being made executors, and ſo having the office of executorſhip put upon them againſt their husbands

husbands will, there hath alſo beene diverſity of opinions. In the time of King *Edward* 1. *Brab.* Juſtice ſaith ſhee may executor without her husband, and the adminiſtration ſhall bee delivered to her onely. And I thinke he meant that this might be without the conſent of her husband or whether he would or not, for ſo it is ſaid in the time of King *Henry* the ſeventh to be the Law ſpirituall, and indeed in Courts ſpirituall no difference is made betweene women married, and unmarried, for ought I can finde: there a wife ſueth, and is ſued alone without her husband; he intermedleth not, nor is intermedled withall touching the things pertaining to his wife. But at the common law it is otherwiſe, and there as *Bryan* Chiefe Juſtice ſaith, a wife without the aſſent of her husband cannot bee executor, hee meaning thereby that the husband may oppoſe and hinder it: for ſuch a one may be named executor in and by a Will without the knowledge of her husband: let us then ſee how after the death of the teſtator, the husband can hinder her proving of the Will or intermedling to adminiſter, ſince it may be a matter both of much trouble and danger to him, to have the executorſhip faſten upon his wife, and conſequently upon himſelfe. On the otherſide, it may bee a benefit and advantage to the husband, and therefore wee will alſo conſider, whether husband may (though his wife would refuſe) aſſume the executorſhip and faſten it upon her. The teſtator therefore being dead, and fame or common bruit carrying it to the Ordinary, that the wife of *I. S.* is made executrix, if ſhe come not in gratis, or voluntarily to prove the Will; *Proces* or a citation is to bee ſent out of the ſpirituall Court againſt her, to enforce her comming

13. Ed. 1. Fitz Exec. 119.

2. H. 7. 15. b.

2. H. 7. 15.

comming in to take on her the executorſhip. She comming may cleerely, as well as any other perſon (eſpecially if her husband concurre with her therein) refuſe this office, truſt and charge, ſo as if there bee no other executor named, the Ordinary muſt commit the adminiſtration: If ſhee ſhould not come and appeare, ſhe ſhould bee excommunicate as I take it, notwithſtanding any allegation or intimation by her husband of his unwillingneſſe to have her take upon her the executorſhip. But ſuppoſe ſhe doth come into Court and offers her ſelfe ready to take the executorſhip upon her, and on the other ſide her husband expreſſeth his diſaſſent thereunto, praying that ſhee may not have the execution of the Will to her committed, what will then bee done? This I confeſſe pertaines to another learning, and not to that of our profeſſion: but foraſmuch as I find that in the Courts ſpirituall a wife ſtands in the ſame plight and ſtate as a woman ſole, the husband not intermedled withall in the affaires of the wife; Therefore doe I conceive that in that Court, the husbands refuſall will not be of force to hinder the committing of the executorſhip to the wife not refuſing, at leaſt if there come not a prohibition to ſtay the Spirituall Courts ſuch proceeding: but whether a prohibition bee in ſuch a caſe to be granted or not, as I find no reſolution in my bookes, ſo will I not take upon me to reſolve. This ſtands cleere in the rules of the law of *England*, that the wife is under the husbands power, and cannot contradict him in pleading and doing other acts even touching her owne Freehold: nay ſhe cannot take lands nor goods by gift or conveyance, without her husbands aſſent, as the law hath beene, and for ought

33.H.6.31. 43.39.Ed. 3.1. 27.H.8.24.

ought I know is taken. But if once the Will bee proved, and the execution thereof committed to the wife, though againſt her husbands mind and conſent, I thinke it will ſtand firme, and the husband and wife being after ſued cannot ſay that ſhe was never executrix, and *I* doubt whether the wife adminiſtring without the husbands privity and aſſent, although the Will be not proved, doe not conclude her husband as well as her ſelfe, from ſaying after in any ſuit againſt them, that ſhee neither was executor, nor did ever adminiſter as executor. Yet perhaps this adminiſtration by the wife againſt her husband's minde, will as againſt him bee as a voyd act, elſe cannot I ſee how *Brians* opinion before cited, *viz.* that the wife ſhall not be an executor, without or againſt her husbands mind, can bee law. On the other ſide if the husband of a woman, named executor, would have his wife to take upon her the execution of the Will, and to prove the ſame, but ſhee will not aſſent thereunto (wiſhing perhaps that gaine and benefit rather to ſome of her kindred by way of adminiſtration then to her owne husband by her executorſhip: as ſometimes wives accord not well with their husbands) in this caſe I thinke the Court Spirituall will not faſten the executorſhip upon the wife againſt her will. But *dato*, that the husband though the Will bee not proved, doth adminiſter as in the wives right, but againſt her minde and will, ſhall ſhe be now hereby bound and concluded, ſo as after ſhee cannot decline or avoid the executorſhip: and ſurely I thinke that during her husbands life, ſhee ſtands concluded at the common law, for that there ſhee ſhall not be, nor can be ſued alone as executor, and then being ſued with him ſhee muſt joyne

11. H. 6. 4. The plea is that the femme did or did not adminiſter without ſpeaking of the husband.

33. H. 6. 31. The husband may adminiſter and prove the will for his wife.

joyne in plea with him, *viz.* that ſhe neither was executor, nor adminiſtred as executor, and then this act of her husbands given in evidence, will as I take it, cauſe that the verdict be found againſt her, not ſo after her husbands death: then ſhe may refuſe, as the Lord *Dyar* ſaith, and citeth as reſolved. Theſe things I thought good to offer to conſideration, and ſo leave them without reſolution. Difference perhaps may be, where a woman ſo made executor taketh an husband after the teſtators death, before either proving or refuſing to prove the Will, and where ſhe is made executor during the coverture, as there is in caſe of a diſcent of her land to the heire of a diſſeaſor; for when there is upon her ſuch a ſtate of election, ſhe marrying before her reſolution or determination, doth upon the matter deliver it into the husbands hands: no ſo where it firſt findeth and falleth upon her in the ſtate of coverture: if the husband were indebted to the Teſtator, this making of the wife executor is as I take it, a releaſe in law, as well as if ſhe were the debtor, but if after the teſtators death ſhee doe marry ſuch a debtor, it is a devaſtation.

1. El. Dy. 366 b. there is cited 3. H. rot. 111. Nota per Bill.

The third Point.

Touching the administration or execution of the Office of executor by a Femme covert and her husband.

WE will now come to admit the execution of the will assumed by concurrent consent of husband and wife, and the will proved with both their likeing in the wives name, and examine what acts the wife of her selfe is able to doe, and what her husband without her.

It hath been conceived by many of old, and by some of late, that if a Femme covert or married woman executrix release a debt of her testator, or give away the goods which she hath as executor, or deliver a legacie bequeathed, it was firme and good, and on the other side, that her husbands gift or release was of no value, for that the administration or execution of the will is committed to the wife only, and some have gone so farre as to say that shee may sue or be sued without her husband (in the Courts of Common Law, I meane, for in the Spirituall Court it is true the husband is not joyned with the wife in suit) but the law is doubtlesse in all those points contrary, as not only some opinion also was of old, *viz.* in the time of *H.* 7. but also hath beene in the late *Queenes* time resolved, for otherwise, if the wives gift or release should stand good, her act might exceedingly endammage her husband, and make his goods lyable to the creditors, the testators state being wasted by the gifts or releases of his wife. Wherefore it was held in the said late case, that unlesse due payment were made to such women

7. H. 4 f. 13.

See 18. H 6 4 In det the plea shall be that she hath fully administred and replic. that she hath assets, never mentioning the husband.

men covert executors, their releaſes or acquittances be void, and ſo alſo their gifts and grants: yea it was then held that the husband of the wife executrix, may give goods or make releaſes of debts at his pleaſure. But doubtleſſe by marriage, neither are the goods though perſonall which the wife hath as executor, devetted out of her and ſetled in her husband as her owne goods are; nor if ſhe dye, ſhall they acrue to the husband, if no alteration were of the property, but ſhall goe to her executor or to the next of kin being adminiſtrator of her teſtator if ſhe have no executor, and ſo was it held in the firſt yeare of Queen *Mary*: Yea though for any other goods which the wife had in her owne right before marrying, the husband alone without naming the wife may maintaine an action of treſpaſſe; yet touching ſuch goods as the wife hath as executor the action muſt bee brought in the names of the husband and wife to the end that the dammages thereby recovered may accrue to her as executor in lieu of the goods. So alſo muſt the replevin for thoſe goods be in both their names. But although the husband bee thus named with the wife, yet principally is it the ſuit of the wife, and therefore in ſuch actions or in debt by husband and wife, ſhee being executor, if it come to tryall by Jury, the husband being an alien, yet ſhall he not have triall *per medietatem linguæ* or *alienigenarum*, that is, by halfe aliens, as in other caſes: Caſes where an alien is party to a ſute is to be had. And whereto a wife made executor, power is given to ſell land of the teſtators; ſhee may ſell to her owne husband, as was reſolved in the time of King *Henry* the ſeventh, where the Feoffees (it being land ſetled in uſe) were committed to the Fleet, for

33. H. 6. 3. 1

M. 31. El. in com. b. If the husband be to avow, it muſt be in the right of his wife executor or adminiſtrator. Manſilds caſe. Doctor Julio. his caſe.

10. H. 7. 20.

That

Bro. Juſt. Cui in vita 15. Shee may ſell to any other, but not to him.

that they would not execute an eſtate to the husband, according to the wives ſtate. But of this I much marvell, ſince the Law intends the wife ſo under the husbands command & ſubjection, that it holds not her diſpoſition of land to him by will free, nor therefore of force, and how ſhall this then be conceaved to be but a partiall ſale; yet *volente non ſit injuria*, and he that will put ſuch power into the hands of a woman under coverture, doth in a manner ſubject it voluntarily to the husbands will. And it hath beene held by ſome, that even an infants or femme coverts conveyance in ſuch caſe of neceſſity ſhould ſtand firme and unavoydable, becauſe of the condition expreſſe or implied, that the ſtate ſhould be void, if no ſuch conveyance made.

Fenner Juſt. In ba. reg. Paſc. 37. Eliz. & 34. E 3. Bro. Cui in vita. 15. No prejudice to them that it be good.

Touching infants, and their making or being made executors.

BEing now to conſider of diſability by age, for want of yeares in perſons making or being made executors: Let us firſt take view of the ſeverall ages of men and women to ſeverall purpoſes materiall in the lawes judgement and reſpect. And firſt, touching a woman: *Wangford* in *Henry* the ſixth ſtis time ſhewes, and other bookes approve that ſhe hath ſix ſeverall ages, reſpected in and by the law. As firſt the age of ſeven yeares, for her father to have aid of his tenants to marry her. Next nine yeares to deſerve dower, that is, that in caſe ſhe bee of that age at the time of her husbands death, ſhe ſhall be endowed, but not if ſhe be any thing under thoſe yeares; the Law being Phyſically informed that a woman at thoſe yeares may conceive a child, but not under them.

1.

35. H. 6. 41. b.

2.

them. But of ſomewhat different opinion was, as it ſeemes, the Parliament in the late Queenes time, when it was made felony to have unlawfull carnall knowledge of any woman child under the age of ten yeares, it being then conceaved, as I thinke, that no ſuch could conſent. The age of twelve yeares is a womans time for aſſenting or diſaſſenting to marriage in more tender yeares had. For ſo it appeares by divers bookes, although Mr. *Littleton* have here no diſtinction betweene male and female. The age of fourteen yeares is a womans time to bee in wardſhip or not, ſo as if ſhe be any thing above thoſe yeares, at the time of her anceſtors death, ſhee eſcapeth wardſhip. The age of ſixteen yeares is her time of comming out of wardſhip, being once fallen under it, for although had ſhee beene full fourteene, ſhee had eſcaped it; yet not ſo being at the time of her anceſtors death, her wardſhip laſteth till ſixteene yeares, except the Lord ſhall ſooner marry her. And laſtly, the full age of a woman whereby ſhee is inabled firmely & unavoidably to make grants or conveyances is one and twenty yeares, as well as for the male, before which time, be it that ſhe being ſole, make a feofment or other conveyance, or being married alien her land by Fine, and her husband of full age joyne with her, yet is it infirme and avoydable.

18 Eliz. c. 7.

3.

4.

5.

6.

Now of the male, or man, the firſt age materiall and ſetledly reſolved on, is twelve yeares, for at that time each male is at the Leet to ſweare his fidelity to the King; this women doe not, and therefore are they never ſaid to be outlawed, but to bee waived, becauſe they have not this admittance into the Law which males have. This hath beene, as I thinke, the ground of that ſpeech,

1.

That

That women are lawleſſe creatures.

2. The ſecond age of males is fourteene yeares, accounted by the Law, the age of diſcretion, eſpecially materiall to two purpoſes, *viz.* Firſt, that if one under that age commit an act amounting to felony, yet is he to ſtand free from the attainder and puniſhment incident to a fellon: Regularly it is thus, but *non eſt regula quin fallit*, one of much leſſe yeares having attained ripeneſſe of diſcretion and diſcerning, ſhall incurre the like attainder as one of full age, as was reſolved in the 3.H.7.f.1.6. time of King *Henry* the ſeventh, touching an infant but of the age of nine yeares, who having killed another boy of like age with his knife, and then hiding the ſlaine boy, and excuſing the blood found upon him, by ſaying that his noſe had bled: It was held by the Judges that he was to be hanged as a fellon, his ſuch non-age notwithſtanding. The other point, touching which, this age of fourteene yeares is eſpecially materiall, is touching an heire of lands held by ſocage; for in caſe ſuch heire bee under that age, hee is to be in ward to the next kin, but if he be of that age, he is not to be in ward at all, for that the law judgeth him to be of diſcretion at thoſe yeares, and therefore a Guardian in Socage being in effect but a Bayliffe accountable, hee hath no need of ſuch an one, other than ſuch as himſelfe ſhall chuſe.

3. The third age in and touching males materiall is fifteene yeares; for every Lord of a Manour; or one having Freeholders in Socage, or by Knights Service, when his eldeſt Son commeth to that age, *viz.* fifteene yeares, is to have of them ayd for the making of him a Knight, towards which every one holding by a whole Knights Fee is to pay twenty ſhillings, and ſo ra-

tably

tably for more, more; and leſſe, leſſe: and each holding twenty pound land in Socage, is to pay the like ſumme, and ſo ratably for more or leſſe.

The fourth age of males, is the full age of one and twenty yeares, which maketh him free from wardſhip, having lands held by Knights ſervice deſcended unto him: And alſo makes him able to alien lands or goods, makes firme his bond, ſtatutes, recognizances, &c. for although at fourteene the law judge him of diſcretion, yet doth it not hold him fully ripe till one and twenty. 4

The laſt age of males reſpected by the law, is ſeventy yeares, at which time Sheriffes are to forbeare to impanell them in Juries, and in caſe they doe not, ſuch old man may have a writ to the Sheriffe, grounded upon the ſtatute for that purpoſe, made in the time of King *Edward* the firſt, commanding ſuch Sheriffe to forbeare the impanelling of him; and he may have an action to recover dammages upon that ſtatute: This is called by moſt a writ of Dotage, a word, perhaps, anciently taken in a good and favourable ſenſe, *Pro dote etatis, viz.* a gift, privilege, or exemption allowed to age in favour thereof, and as a benefit. 5

Oblitum. Another of 60. to exempt from being compelled to ſerve by the ſtat. of labourers 23 E. 3. c. 1. W. 2. cap. 38. 13 Ed. 1. no. na. b. 165.

Having thus by way of ingredient or introduction taken view of theſe ſeverall ages, let us now ſee wherein and how age is materiall, touching them who are to make or to bee made executors, and what age required thereabout. Maſter *Perkins* ſaith, that one of foure yeares old may make a will, and conſequently executors; and his reaſon, becauſe the executors being to account before the Ordinary, it cannot be intended but that the goods ſhall be diſtributed for the good of his ſoule: He ſpeakes as if hee only made an execu-

Deviſes. f. 97 No good reaſon, for one may make an ill account, ſpecially having a childs direction for his doings.

tor by his will, but did not bequeath any thing, but left all to the executors conſcience and diſcretion, which is not uſuall, though feſible, as before I have ſhewed, or ſaid at leaſt. But admit it were ſo, and no bequeſt at all contained in the will, yet ſince at that age an infant hath no diſcretion to elect a fit perſon to diſtribute his goods, money, and other things; no nor to make continuation of an executorſhip to another, to whom perhaps the infant was executor: I cannot ſee that his will ſhould be of any force, but if he bee of the age of 14. years, being the age of diſcretion, in the judgement of law, then I ſhould hold him able to make a will, although yet he be an infant till twenty one yeares, and can make no gift of land nor goods which ſhall be of force. And *Babington* chiefe Juſtice, to other purpoſe makes like diſtinction betweene an infant of ſuch tender yeares, and one come to the yeares of diſcretion. So alſo as before wee ſhewed, is it in the Caſe of fellony. And that way alſo ſounds that which *Hanck*: ſayes in *Henry* the fourth his time, *viz.* that an infant of 18. yeares old may be a diſſeiſor; as implying that his yeares may be ſo tender, that as *Candiſh* ſaith of an infant in *Edward* the third his time, hee is not to be intended able to know or diſcerne betweene good, and evill, me thinkes therefore hee ſhould be at the leaſt of the age of diſcretion, *viz.* 14. yeares who ſhould bee able to make a will, and conſequently an Executor. And the cuſtome for an infant of 15. yeeres old to bequeath by will hath as to me it ſeemes, affinity with this opinion, though there the Caſe was of land in a borough deviſable by cuſtome: and that way reflecteth the Caſe in the time of King *Henry* the ſixth, where it was ſaid that an infant under

9.H.6.f.6.

2.H.4.22.

40.Ed.3.44

37.H.6.5.

11.H.6.f.40.6.

der fifteen yeares of age ſhould not wage his law, *viz.* take an oath to acquit himſelfe of a debt or excuſe his default in an action reall. And further reaſon of this opinion will ariſe out of the conſideration of an infant made an executor.

Now touching an infant made executor, how young ſoever he be, the making of him ſo is not voyd, but yet the execution of the Will, which is the performance of the office of Executor ſhall not be committed to him till he come to the age of ſeventeene yeares by the law ſpirituall, and till then (for that he is not able to doe the part of an Executor,) adminiſtration is to be committed to ſome other; yet if it bee a woman infant who is ſo made executrix, in caſe ſhe be married to a man of ſeventeene yeares old or more, now is it as if ſhe were of that age, and her husband ſhall have the execution of the Will, and if adminiſtration were before committed during the minority of the woman, it ſhall now ceaſe, as is ſaid in *Princes* Caſe. Yet I doe a little marvaile at theſe opinions, conſidering that theſe things are managed in the Spiritual Court, and by that law; and it intermedles not with the husband, in the wives caſe; now by that Law, and not our Common Law, comes in this limit of ſeventeen yeers. And I have ſeene it otherwiſe reported in, and touching the laſt point.

Co. lib. 5. fo. 29. p.

M. 41. & 42. Eliz.

Co. l. 5. f. 29.

Further touching infants executors, and under the age of ſeventeene yeares this is to bee noted, *viz.* that ſuch an one is not able as an executor to aſſent to a legacie, ſo as it may by vertue thereof ſettle in the legatee. Alſo if adminiſtration bee during ſuch minority committed with ſpeciall words of reſtraint or limitation, *viz.* that it is done to the uſe or profit of the infant executor,

But payment is to bee made to the executor, and not to the adminiſtrator. M. 15. & 16. El. in Com B. rep. 67. Co. lib. 5. fo. 29.

tor, then no ſale of leaſe, or goods, or aſſent to legacie, by ſuch adminiſtrator, will bind or prejudice the infant executor; but otherwiſe, perhaps, if the adminiſtration during the minority be committed generally. And if the teſtator himſelfe, making an infant Executor, doe alſo appoint another to be his executor during his non-age, expreſſing it to be only for the benefit, and behoofe of the infant executor, I doubt whether this temporary executor ſtand any whit reſtrained from what pertains to the power of an abſolute executor, for there may be perhaps difference between him to whom the owner of the goods commits the government of them, though but for a time, and in ſpeciall manner, and an adminiſtrator ſo ſpecially made by the ordinary, another being preſently by the will of the owner or teſtator to have the adminiſtration, in whom for a time legall defect is found. But now let us paſſe over this age of ſeventeene, and conſider of the infant betweene that time of his being admitted to take upon him the executorſhip, and his accompliſhment of his full age of one and twenty. Firſt then ſuppoſe that he doth releaſe a debt due to his teſtator, whether ſhall this be good to bind him, and to diſcharge the debtor as well as if the executor had been of full age, he now having proved the Will, and being by the Law Spirituall approved an able executor. And this point comming in queſtion in *Ruſſells* Caſe, in the late Queens time, conſideration was had both of divers good reaſons for enabling of this releaſe, as that an executor repreſents the perſon of his teſtator, and in his right, and power, doth theſe acts, and not in his owne, and therefore his infancie, which is a ſtate or condition of his owne naturall perſon, ſhall

Co. lib. 6. fo. 671.

H. 26. Eliz.

ſhall no more diſable him than it doth the King, a Major or other Head of a Corporation. Alſo divers Bookes were found to runne that way, as well in the caſe of an infant, as of a Femme Covert. But upon great deliberation in the Kings Bench, and upon conference had with the L. *Anderſon*, *Manwood* and other Juſtices, it was reſolved, and adjudged that the releaſe of an infant executor without payment of the debt or duty would not bind or barre him, firſt for that if it ſhould, it would be a waſting or devaſting of the goods of his teſtator, and ſo would charge his owne goods. Secondly, It would bee a wrong which an infant could not doe by his releaſe. Thirdly, It was no purſuit nor performance of the office or duty of an executor, but the contrary: And upon this judgement a writ of errour was brought in the Exchequer Chamber, where it was agreed by all, that the releaſe was not effectuall nor binding, ſo as this point now had the reſolution of all the Judges of England. But it was agreed, that if payment or ſatisfaction had been made, then the infant executor might have made a good acquittance, and diſcharge, and indeed payment it ſelfe if proved, brings diſcharge enough, except in the caſe of a ſingle Bill; Note that the principall caſe adjudged was not of a releaſe of any debt or duty by ſpecialty, but of treſpaſſe in converſion of goods found or taken in the teſtators life time. But *Poſito*, that this infant had aſſented to a legacie, whether will this bind him or not? for in the ſaid Caſe of *Ruſſell*, it is ſaid that all things which an infant doth according to the office, and duty of an executor, will ſtand firme; now it is part of his office to pay, and execute legacies. Yet ſince this act amounts to a vaſtation or waſting of

16. H. 6. Rt 45. 21. E. 13. 24.

Co. lib. 5. fol. 27.

the teſtators goods, as well as the other, in caſe there remain not goods ſufficient for payment of the debts, and conſequently here as well as in the other caſe, the infants own goods would become lyable to his teſtators debts; I doubt, and incline, that it is not, nor can ſtand effectuall, for except in the other wee admit a want or poſſibility of want of aſſets or goods, the releaſe could neither hurt the infant himſelfe, nor doe wrong to any other, and that admitted, this caſe is of like prejudice; yet if this aſſet ſhould bee void, ſo alſo would be his payment of legacies, and how then were he an able Executor at the age of ſeventeene yeares to ſue, and to be ſued for debts, and legacies, and if upon ſuit it cannot bee ſhewed that debts will take up all, or diſable the payment, then happily he may be forced to pay; Quære notwithſtanding whether theſe acts though voluntary ſtand not good upon *Bene eſſe* or conditionally, *viz.* if there be beſides goods ſufficient, *&c.* or that elſe the nonaged executor may have an action of accompt for the money by him payed to the legatee, and alſo avoid his aſſent where that onely needfull. But doubtleſſe neither the aſſent of ſuch executor before his age of ſeventeen, nor any payment of a debt to him could bee good, although ſuch acts to or by another Executor, before the proving of the Will would ſtand firme and good: for this infant wants not onely proving, but alſo ability to prove his teſtators Will, yea, the Will ſtands ſuſpended, and the teſtator as it were inteſtate, whilſt the adminiſtration ſtands in force, ſo as during that time nothing can bee done by any as executor, and therefore there is great difference betweene the caſes. What if payment of a legacie be made to an infant, can he make a ſufficient

cient acquittance; This I confeſſe is beſides the point in hand, yet becauſe it concernes infants, and executors (though not infant executors) it is not amiſſe here to caſt ſome thoughts, and words upon the point, for that it many times perplexeth both executors, and legatees. Firſt, therefore in caſe the executor be of the years of diſcretion, *viz.* fourteene. I hold it cleare that any payment to him made will ſtand good, for that the Law at that age holds him able to governe, and manage his own lands held in ſocage, and conſequently to receive the rents thereof, wherefore, whether he who makes ſuch payment have any acquittance or not; if he have proofe of the payment, he is well enough acquitted from any ſecond payment, and if without payment he get an acquittance, it will not ſuffice, the infancie of him who makes the acquittance conſidered. Beſides, if the acquittance be as moſt uſually they are, but ſigned onely with the name of the maker, and not ſealed, it is only an evidence or proofe of payment, and no pleadable acquittance, becauſe no deed, ſo as it nothing differs from proofe by witneſſes, ſave that it is not mortall as they. But now if the infant be under the yeares of diſcretion, what ſhall wee ſay to a payment to him ſpecially, if hee be but three, or foure yeares old, or thereabout: here I think caution is to be uſed by the executor generally, and the ſureſt way is, if hee feare to keepe it in any reſpects, to pay it into the Court, where it is recoverable, *viz.* where the will was proved; yet the caſe ſo may be, as that this payment may not be at all ſafe for the executor. As put the caſe that he entred into bond or ſtatute to pay all legacies by ſuch a day, to the ſeverall legatees, here I think the payment into the Court Spirituall ſufficeth not,

Notes of receits called acquittances.

Quære.

not, for that muſt make the receit to bee, with ſome charge, which is in ſome kind an abatement; there I think therefore legally to ſecure the Executor, the payment muſt be to or in the preſence of the guardian becauſe of noriture, *viz.* him or her who hath (though not as gardian in reſpect of lands) the cuſtody or education of the infant: for otherwiſe to pay it into the hands of ſuch a tender infant ſeparate from any governour, or gardian, were to expoſe it to loſſe, both for that hee is not able to count the ſumme, and for that he yet not being come to diſcerning yeares were like with *Æſops* Cock, to part with pearles or coine for plumes and trifles of no value. But in caſe no bond nor other collaterall penalty lye upon the executor, or in caſe the bond or ſtatute be onely to performe the Will generally, which nothing alters the courſe of payment, which by the Will the Law layes upon executors, then is not the executor put to any ſuch payment, nor need pay without demand, and acquittance, as in caſe of payment, upon a ſingle Bill, or of rent ſeck where no diſtreſſe can be taken, nor other penalty incurred: yet in that caſe if demand be, and acquittance ready to be given, let the executor take heed, in caſe he be bound to performance, that he ſtand not upon the invalidity of the acquittance in reſpect of nonage, for as I have ſaid, proofe by witneſſes may ſupply a nullity of acquittance, and much more the weakneſſe or imbecillity, payment according to the teſtators appointment, being the matter which acquitteth the payer, and this the executor may have teſtified under the hands of divers witneſſes expreſſing circumſtances, ſo as all dying may continue ſafely from ſecond payment as well as an acquittance, the witneſſes whereunto

to are ſubject to mortality, as well as the other. But herein Courts of equity doe often interpoſe helpfully for them who ſeeke not evaſion from payment, but only ſecurity in paying. And of infant executors, and by occaſion thereof, of infancie in legatories, or legatees, thus much.

Of Legacies.

ALthough theſe be not recoverable at and by the Common-law, but moſt naturally at and by the Law Eccleſiaſticall, yet by ſuits in Courts of Equity, as the Chancery and Court of Requeſts, they are often obtained, and of many things touching them the Common-law taketh notice, and hath manifold occaſions ſo to doe: wee will therefore conſider thereabout theſe parts or points, ſome whereof have been in part before touched upon other occaſions.

1. Whether any legacie in certaine and lying in prender, may be taken, or had, without the executors aſſent by the legatee, or him to whom it is bequeathed?

2. When an executor can, or ſafely may pay, deliver, or aſſent to a legacie?

3. Whether one executor alone may doe it, and what if the executor bee an infant or woman covert?

4. What ſhal amount to an aſſent of the executor, and what to a diſaſſent or diſablement of aſſent?

5. How a Leaſe or chattell reall may be given to one for a time, with remainder to another, how not.

6. Where an aſſent to the firſt or one part of the bequeſt ſhall imply or amount to an aſſent for the reſidue.

Of

7 Of the manner of aſſents, and therein of aſſents conditionall.

8 What manner of intereſt hee in the remainder of a leaſe after the death of another hath during the life of that other, and whether he may diſpoſe of it during that time and how ?

9 Whether this remainder can be defeated by any act of the deviſee for life, or by the death of him in remainder firſt ?

10 By what acts or accidents a legacie may be forfeited or loſt, and therein of revocation, death before, &c.

11 Whether the executors aſſent ſhall have relation to the teſtators death, and ſhall make good a grant before made by the legatee.

If the executor give it to another, the legatee hath no remedie at the Common Law per Priſot. 37. H. 6. 30.

As for the firſt, we have before ſhewed the aſſent of the executor to be neceſſary before any legacie can be had, for that debts are firſt to be paid, and that the executor is to looke to at his perill. But hereto adde a little out of M. *Swinborne* a learned Civilian, who ſaith, that in caſe any goods be in the hands or cuſtody of *I. S.* and the owner doth bequeath them to him, then may he keep or retaine them againſt the will of the executor, ſo as there be other ſufficient goods in the hands of the executor for payment of all debts: but though this as it ſeemes would it ſtand in the Eccleſiaſticall Law, yet for that no property is transferred to the legatee without the executors aſſent, therfore doubtleſſe the executor may at the Common Law recover the thing with-held, or damages to the value againſt the legatee detaining it. Another caſe there is, wherein as the learned Civilian ſaith, the legatee may take the thing to him bequeathed lying in prender, *viz.* Horſe, other beaſt, or peece of Plate, or other like thing known

and

and in being, and that is where the teſtator doth expreſly ſo appoint by his will. But herein doubtleſſe the Common Law, at and by the which debts are recoverable againſt executors will oppoſe the Law Spirituall, for elſe by ſuch appointment the teſtator might cauſe that all his goods ſhould be taken by legatees, and that none ſhould remaine to pay debts. Yet if there be other goods beſides ſufficient for payment of debts; then indeed I ſee not how the executor can hinder ſuch taking without violating his oath taken for performance of the will. If any ſay that it is alſo a breach of oath in the other caſe, I ſay he obſerveth not that there that clauſe in the will being againſt the law is void, and conſequently there is a nullity upon it, and it is as if no ſuch thing were in the Will, and ſo the oath extends not to it. And as a chattell ſhall not be transferred to a ſtranger without the executors aſſent; ſo if the deviſee be to the executor himſelfe, till hee elect to take as legatee, it ſhall be to him as executor, as appeares by the ſtrain and argument of two caſes in *Plowd.* Comment. and more lately in the Kings Bench, the point being divers dayes argued was at laſt ſo reſolved by three Judges againſt one: and the reaſon of *Coke* at the Barre was very good, for here the executor ſuſtaines two perſons, *viz.* an executor, and legatee, and ſo all one, as where the bequeſt is to another, for *Quando duo jura concurrunt in una perſona, æquum eſt ac ſi eſſent in diverſis.* Welcden and Elkington. Paramour and Yardley. Portman and Simmes caſe.

As for the ſecond point, it may have theſe two parts: Firſt, when the executor is able to give ſuch aſſent to a legacie. And ſecondly, when hee may doe it with ſafety. As for the firſt, he is able before probat of the Will to aſſent unto the execution Trin. 37. Eliz. Al but Gawdy ſo agreed. 21. El. Dy. 367.

cution of a legacie, as elſewhere is ſhewed, and that although hee bee not of full age of one and twenty yeares; but if hee bee under ſeventeene yeares, ſo as he is not able to take upon him the office of an executor, and therefore adminiſtration is during that time to be committed to ſome other; Here his aſſent is not of force or effectuall, as we find in *Princes* caſe to have been held in the caſe of *Pigot* and *Gaſcoine*. As for the ſecond part, till all debts be paid, the executor may not ſafely conſent that the legatee into the leaſe or chattell deviſed, no more than he may pay money bequeathed, if there bee not ſufficient alſo to pay all debts. Of theſe things more is ſaid elſewhere. Yet becauſe the Reader, or he that deſires direction in theſe points will looke for them under this title, I thought not good here to be altogether ſilent touching them.

Co. lib. 3 fo. 29.

6. H. 7. 5. If the bequeſt be to one of the executors, he may take it without aſſent of his companions, yet if a debt, his compan. may releaſe it. 48. E. 3. 14, 15.

As for the third point, *viz.* Whether the aſſent of one executor, where there be many, be ſufficient, I ſee not how to doubt, ſince any one executor may give away any goods of the teſtators, or releaſe any debts due to him, therefore much more aſſent, which is no more or greater work in effect than an atturnment of one leſſee upon a grant of a reverſion. And if there want to pay debts, he only who aſſented ſhal anſwer for it of his own goods, and not his companions. But if this executor be either under the age of ſeventeene yeares, or under coverture, *viz.* a woman married, ſuch is not able to give a good aſſent to bind the others, no nor themſelves, for then thereby the Infant might draw a debt upon himſelfe, and the wife upon her husband, by aſſenting to or paying of a legacie, there not being ſufficient goods to pay all debts. But the husbands aſſent is ſufficient where the

So held where but one of the executors during nonage aſſented, in the caſe of Rhetorick and Chapel. H. 9. Jacobi. Rot 895. in Ba. Reg. C.

wife

wife is executor, for his acts whom ſhee hath choſen to be her head, may prejudice as well her as himſelfe 3 yea though ſhe were within age, yet hee being of full age, his aſſent will ſtand good. But if hee or another executor in his owne right be above 17. yeares of age and under 21, I doubt whether now his aſſent will be ſufficient, at leaſt except the caſe be put that there be aſſets ſufficient which perhaps there may bee materiall, though not in the other. See more hereof after in the title of women covert, and Infants executors.

See Co. lib. Intr. 150. the executor being devi. tee for life ſaid, the other ſhould have it after her death & he entred and tooke admin. ſhee dying intestate, yet held Aſſets in him.

As to the fourth point, firſt there may bee an aſſent and election implyed, as well as expreſſe, for if in the deviſe or bequeſt the legatee be appointed to do ſome act as in reſpect of the legacy, and the executor doth accept the performance thereof, this amounteth to an aſſent. So if the deviſe bee to an executor for the education of ſome children which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as executor, as appeares by the caſe of *Parſmour* and *Tardly, Plowd.* 543. So if an horſe be bequeathed, and one offering to buy him of the executor himſelfe, he directeth him to goe and buy the horſe of the legatee ; or if the executor himſelfe offer money to the legatee for the horſe, this implyeth an aſſent that it ſhould be the legatees by the will, and ſo was it held in the caſe betweene *Low* and *Carter*, where the deviſee of a terme did grant it to the executor, and this acceptance of a grant from him was held to imply the executors aſſent that it ſhould be his to grant. But I ſee not well how that ſhould be law, which in the latter part of the Lo. *Dyer* is found, *viz.* where a terme was deviſed to *I. S.* and hee was made executor, and after the death of the teſtator

This M. 19. H. 7. Rot. 318. ſee lib. Intr. 321. One gave the third part of his goods to A with whom the Exec. accounted for the amount, & A ſued for that ſumme in det, but no judgem. upon demurrer. Tr. 37. Eliz. in ba. reg. Where bequeſts to ex. himſelfe.

teſtator entred and occupied the lands a whole yeare without proving the Will, that this was an election to have it as deviſee and not as executor. For firſt hee had good right to the terme as executor before probat, and ſo might clearely in that right have taken the profits, although it had not beene deviſed or bequeathed to him, and that before any will proved. Secondly, he could not by right have it as legatee without aſſent of himſelfe or ſome other as executor. Therefore this generall acceptation can determine no election, as elſewhere is held. As for diſaſſent or diſablement to aſſent. As if the executor doe once declare his aſſent that the legatee ſhall have his legacy, hee may then enter into it or take it notwithſtanding the executors countermand or revocation of his aſſent after. So on the other ſide, I thinke if hee doe fully and expreſſely deny that the legacy ſhall take effect, hee cannot after make a good aſſent thereunto, for that election once made muſt ſtand peremptory, be it refuſall to aſſent, or aſſent. Yet *quæ.* of this, for that the refuſall to aſſent may be checked by ſentence or decree, in the ſpirituall Court or Court of Equity, and ſo an aſſent be inforced. But if the power of aſſenting be legally loſt by the meanes aforeſaid, *viz.* diſabled, I ſee not how any legall intereſt can be transferred by that compelled aſſent, howſoever decreed. And what is ſaid of a legacy bequeathed to another, the ſame may be underſtood in caſe where the bequeſt is to the executor himſelfe, and hee makes his election to have it as legatee, or as executor. But if where an Horſe is bequeathed to *A.* the executor after the teſtators death doth ride the horſe or uſe him in the Coach, or in the Plough; I doe not take this to be any ſuch diſagreement

Tr. 37. Eliz. If he by will bequeath it to I.S this is an election to have it as legatee.

So if the executor take a new leaſe his aſſent after is void. Tr. 37. Eliz. in Carters caſe. 19. Eliz. D. 359.

greement to the execution of the legacy, as that the executor cannot after aſſent to the legatees having thereof, no more (though it be ſomewhat more) then where a drinking-cup is bequeathed, and the executor after the teſtators death doth uſe it to drinke in, nay, if a leaſe of land be bequeathed to *A.* And the executor continueth the depaſturing of the teſtators therein, yet is not this any diſagreement to the execution of the legacie, but if this leaſe-land were let out by the teſtator from yeare to yeare, and the executor diſchargeth the tenant, and taketh it into his hands at the yeares end, this I conceive to be a diſ-aſſent to the legacy, and ſo alſo perhaps may his taking or diſtraining for any rent thereupon due after the teſtators death; yet am I not reſolute that the diſaſſent is ſo peremptory and unchangeable, as the aſſent, remembring the caſe in King *Henry* the eight his time, where a terme being granted by a leſſee conditionally, ſo as the aſſent of the leſſor could be had by ſuch a day, though the leſſors aſſent were at one time denied, yet might it bee yeelded at another, ſo as it were at any time before the day: But yet there it was held, that if no time of aſſent were limitted, then one expreſſe deniall or refuſall would be peremptory, ſo as the refuſall were expreſſed to the party to whom the aſſent was to bee given otherwiſe, if it were but in ſpeech to or among ſtrangers. This and the former caſe, 19. *Eliz.* give the beſt light to this point that I remember. Now for diſablement to aſſent, it was held in the fore-mentioned caſe of *Low* and *Carter*, that where a terme is bequeathed to *A.* and after the teſtators death the executor takes a new leaſe of the ſame land for more yeares in poſſeſſion, or to begin preſently; now by this

14. H. 8. 23.

Dy. 359. After choice once made, no variation.

was

was the terme left by the teſtator ſurrendred and drowned, ſo as it could not paſſe to *A.* by the executors aſſent after.

As to the fifth point, *viz.* in what manner a leaſe for yeares or other chattell reall may bee bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a leaſe for yeares was bequeathed to one for life, or for ſo many yeares as he ſhould live, whether the limitting of a remainder thereof after his deceaſe were of any validity in law or not: and this doubt had this ground; any ſtate for life in the judgement of law is greater than any terme for yeares, therefore when a termer hath by his will given his terme, or his houſe or land, which hee ſo holded for yeares to one for life, or for ſo many yeares as he ſhall live; this teſtator and deviſor hath not in the judgement of the law any eſtate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguings and debatings, it was in the late Queenes time reſolved that ſuch a remainder was good, and that if the firſt deviſee died before the terme expired, that then he to whom the remainder was limitted, might enter and enjoy the reſidue of the terme: As for the giving of part of the yeares to one, and the reſidue to the other: *viz.* If the terme being twenty yeares, the Leſſee bequeatheth ten thereof to his wife, and the remainder to his daughter. Of this no doubt ever was, but that it was good, for that after the firſt ſtate limitted, there remained a further terme, *viz.* ten yeares more in the Deviſor, whereof he had power to diſpoſe, whereas in the other Caſe, after the terme limitted to one for life, there remained but a poſ-

Plow. Com. 520. & 542.

ſibility

ſibility that this life ſhould not take up the whole terme. But now put we the caſe a third way, *viz.* that the termor deviſeth or bequeatheth the thing in leaſe to one child intaile, with remainder to another, and dyeth, and the firſt entreth and dyeth without iſſue; now whether ſhall the next in remainder, or the executor of him ſo dying have the terme refidue; and this caſe came in queſtion and was adjudged about the middle of K. *Iohn* his reigne in the Exchequer, for there Maſter *Hamond* holding by leaſe for yeares from the Crowne, the manner of Akers in Kent deviſed the ſame by his will to *Alexander Hamond* his eldeſt Sonne, and the heires males of his body, with remainder to *Ralfe Hamond*, another Sonne in like manner, and the like remainder to *Thomas Hamond*, and made the ſaid *Alexander* executor, who after his fathers deceaſe elected to take as legatory, and after *Ralfe Hamond* died leaving iſſue male, and making his wife executrix; *Alexander* not having iſſue male, granted the whole terme by deed to *B.* and *C.* for the behoofe of himſelfe and his wife during their lives, and after to the uſe of his yongeſt daughter whom Sir *Robert Lewkenor* married; then *Alexander* dying without iſſue male, the wife, and Executrix of *Ralfe Hammond* entred claiming the terme, and being kept out ſealed a Leaſe, whereupon an *Eject. firmæ* was brought, and a Jury appearing at the Barre in the *Exchequer* found a ſpeciall verdict in effect *Vt ſupra*. And in argument of this Caſe, firſt the maine queſtion was whether this Caſe were all one in Law with the former, where a terme was deviſed to one for life, which remainder over ſo as by the death of *Alexander Hammond* without iſſue male, the terme ſhould goe to the next in remainder as in the o-

Both Alexander and Ralfe were executor; but that makes no difference.

ther Caſe, by the death of the deviſee for life dying within the terme it ſhould doe. And on the plaintifes part it was urged to be all one, ſo that by vertue of the *Bequeſts ſupra*, *Alexander* had an eſtate to him, and his executors onely, ſo long as there ſhould be heires males of his body, and hee dying without ſuch iſſue, the terme remained to the Executors of *Ralfe*, who had the remainder in like manner, and left iſſue male which ſtill lived, and ſo that ſeat of *Ralfe* yet had continuance. For it was admitted by the counſell on that ſide, that the terme could not goe to the iſſue male of *Ralfe*, according to the words, and intent of the will, ſince it was impoſſible to make a terme to deſcend without an act of Parliament. This therefore they ſaid the Law ſhould worke, which was neereſt to the intent, *viz*. that after *Alexanders* death it ſhould goe firſt to his Executors, and aſſignees, ſo long as iſſue male of his body doth continue, and for want of ſuch iſſue, then to *Ralfe* his executors and aſſignees, ſo long as his iſſue male ſhould laſt, and therefore in this caſe the iſſue male of *Alex.* failing, the executor of *Ralfe*, whoſe iſſue male fayleth not, ſhould injoy the terme, and ſo judgement ought to be given for the plaintife, being leſſee of that Executor: on the other ſide it was ſaid by the defendants counſell, that this caſe differeth much from the other Caſe, where the terme or Land held by Leaſe, is given but for life to the firſt with remainder to another; which Caſe as having beene often reſolved, was clearely admitted to bee good law; for in that caſe the intent of the Teſtator might, and did take effect. But in this caſe if the land ſhould goe to the Executors, and aſſignees of *Ralfe Hammon*, it muſt goe againſt the intent of the Teſtator, whoſe

whose mind, and will was, as it appeares by his word, that it should goe onely to the issue male, of one sonne after another, and not to any Executors. Now then since this intent was so contrary to the rules of Law that it could not take effect, therefore it must be voyd, and so all the words of heires Male standing voyd, the Will is to be construed as a sole, and absolute gift, and bequest to the said *Alex.* and consequently the terme must goe to his Executors, and assignees. And for this point resemblance was made to a Case resolved in the Kings Bench, where a Lease was made by indent. to *A. Habend.* to *A. B.* and *C.* for their lives: now because *B.* and *C.* could take nothing, it was resolved that *A.* should not have it for their lives, but for his owne onely. This Case was said to come very close in reason to the Case in question; for as here the intent of the Lease was that *B.* and *C.* should be estated for their lives, and since that could not be, therefore the naming of them should be utterly voyd, and as if they had not at all beene named; and their lives shall not stand as a measure for the estate of *A.* So in the other Case the intent of the will, being that the Lease or Land leased should goe to the heires Males of the body; first, of *Alexander*, and after of *Raulphe*; since this cannot be, therefore the words, and name of heires males should stand for a meere blanck and cipher, and not to measure out any state to the said *Alex.* and *Ra.* and their executors, and assignes. Also it was said on the defendants part that an estate for life in the judgement of Law is of so short, and uncertaine continuance, that if *A.* make a Lease to *B.* for his life, and after makes a Lease of the same Land to *C.* for yeares now, shall not this

Windsmore and Holford vel Holbord in 28. & 29. Elizab. argued; and Tr. 29. Eliz. adjudged.

latter Leaſe bee voyd abſolutely, for any part of the terme, but ſhall ſtand in expectance of the death of *B.* and as ſoone as he dyeth, ſhall take effect immediately, whereas if the Leaſe to *B.* had beene for ten yeeres or any like terme, then the Leaſe to *C.* ſhould have been voyd for ſo many yeeres of his terme, thus it appeares that a State for life is very momentary in the judgement of Law, and not reputed of any certaine continuance ſo much as for a day, but it is otherwiſe of an eſtate tayle, ſo as if *A.* having given Land to *B.* in tayle doth after (without indenture which makes an Eſtopell) make a Leaſe to *C.* for *xxj.* yeeres, and then *B.* dyeth without iſſue during the terme, yet ſhall not the Leaſe take effect, becauſe it was utterly voyd at the firſt making. For an eſtate tayle being a ſtate of inheritance may in the intendment, and judgement of Law have continuance for ever, as appeares both by the Caſe of *Adams* and *Lambert*, where it is held within the Statute of Chanteries which ſpeakes of gifts to have continuance for ever. Therefore a reverſion upon an eſtate tayle is no aſſets, nor giveth cauſe of receipt, otherwiſe in all theſe Caſes it is touching a reverſion expectant upon a ſtate for life. Againe it was ſaid by the defendants councell that an eſtate may be limitted to *A.* and his heires during the life of *B.* with remainder to *C.* as in *Chudlies* Caſe was reſolved, but if Land be given to *A.* and his heires, ſo long as *B.* ſhall have heires of his body or heires males with remainder over to *C.* this remainder is utterly voyd. So as there is in the judgement of Law a great difference betweene the largeneſſe, and continuance of an eſtate tayle, and of an eſtate for life. And if (which is worth the obſerving) a fee ſimple

ple cannot afford a remainder to be drawne out of it after ſuch a gift to one, and his heires during the continuance of an eſtate tayle, or of the meaſure thereof; much leſſe can a terme yeeld ſuch large thongs to bee cut out of it, as a remainder after an eſtate to one ſo long as he ſhall have heires of his body, or heires Males, which is all one. And in this caſe the remainder was held voyd by *Baldwin*, and *Shelley*, though *Englefield* were of contrary opinion, as the Lord *Dyar* ſheweth. Further it was ſaid, that if ſuch a conveyance by will ſhould ſtand good, it would raiſe a perpetuity not to be cut off, by any recovery. 28.H.8 Dy. fo.7.

But whereas the caſe of *Hammon* hath beene related before, (ſo by way of admittance it was argued as a gift, and bequeſt to *Al. Ham.* and the heires Males of his body with remainder in like manner to *Ralfe*. The truth of the caſe was, that the words of the will, were onely to *Alexander*, and his heirs Males (not ſpeaking of his body) and ſo to *Ralfe*, which as was urged by the defendants counſell, made the Caſe ſtronger againſt the plaintifes: for admit that the former way *Alexander* ſhould have had but a ſtate determinable upon the continuance of his iſſue Males, yet here not ſo. Since the reaſon why in Willes, ſuch a deviſe being made, the Law ſhould ſupply the words (of the body) is only to make an eſtate tayle to the iſſues Male according to the Teſtators intent. Now in this caſe of a terme for yeares ſo bequeathed no eſtate tayle could poſſibly bee, though theſe words had beene in the will, and therefore the motive to the Law fayling, no ſuch ſupply will bee made by the Law, ſince it would bee to no purpoſe: conſequently, here was neither ſtate tayle nor iſſues or heires Males of the

body, on whose continuance this state of *Alex.* should bee determinable. Therefore it was an absolute, and totall bequest of the terme to *Alexander* for ever, *viz.* so long as the Terme should continue: for as a bequest to one for ever is asmuch as a bequest to him, and his heires; so a bequest to one and his heires, is as much as if it had beene to him for ever.

And this Case after six arguments, on each side at the Barre (if I much mistake not) was upon argument by the Barons adjudged for the defendant, by the Lord chiefe Baron *Tanfeild*, and Mr. *Baron Bromley*, Mr. *Baron Denham*, (who onely heard as I take it, one argument on each side, made of purpose in respect of his comming into his place after the former arguments) being of the contrary opinion: and the judgement proceeded upon the point formerly touched, that as this case was the state of *Alexander* did not end by his death, and remaine to the Executors of *Ralfe*. Other points were stirred which will bee touched upon other divisions after in this Chapter, It will be observed that I doe more fully expresse reasons, and points inforced on the defendants part, then on the plaintifes, whereof let these two reasons be accepted. First, That I better could relate that then the other, being the first who argued for the defendant, and hearing little of that which was by others said on either side after, nor hearing the Courts, *Nec ad hoc conducius, nec petibus fortis.* Secondly, the labour did lie on the defendants part to prove that this Case differed from the common case of devise to one for life, with remainder to another.

Wee are now come to the sixt point. *viz.* that where House, or Land held by lease, or the profits

fits thereof, or the leaſe or terme it ſelfe which in a Will makes no difference, is bequeathed to *A.* for life, or for ſome part of the terme with the remainder to *B.* and the executor aſſenteth that *A.* ſhall enjoy his bequeſt, whether this ſhall enure to *B.* alſo ſince without the executors aſſent, no legacy can take effect. And it hath beene reſolved that this aſſent ſhall be effectuall, as well to all the remainders as to the firſt eſtate, and ſo according to former reſolutions, it was admitted in *Hamons* Caſe, that *Alexander* his aſſent to take as legatee ſufficed (if the bequeſt had beene good) for the remainders to *Ralfe*, and others. And the reaſon of this doubtleſſe is, becauſe here the particular eſtate, and the remainder are all but one eſtate in Law ; they make but one degree in a Writ of Entre, nor ſhall have but one yeare, and a day to enter for mortmaine ; And an attornement to the grantee of a rent or reverſion for life with remainder over doth enure alſo to the remainder, which being aſſent hath much affinity to that of the Executor, each tending to perfect the grant of another man. Now then whereas it was urged in *Hammonds* Caſe, that the ſtate limitted to *Ralfe*, ſhould take effect not as a remainder, but as a new eſtate to commenſe futurely, *viz.* when *Alexander* ſhould be dead without iſſue male : if it ſhould be admitted to be ſo, then could not the aſſent of the firſt ſtate to *Alexander* have enured to this, ſince to *A.* remainder it worketh as being one eſtate with the firſt, which reaſon muſt faile th'other way. This difference betweene a remainder, and new eſtate future brings to my minde the caſe of a rent by way of new Creation granted by *C.* out of land to *A.* for life or in taile with remainder to *B.* in like

Ploud. 545. 6
Co. lib. 10. f. 47.

manner where it hath probably beene held, although this limitation to *B.* cannot be good by way of remainder, becauſe *C.* had no eſtate in the rent remaining with him when he made the grant to *A.* yet ſhould it be good by way of new grant, & creation to commence futurely. But this doubtleſſe cannot ſo be but with a difference, for if the grant were by indenture between *C.* on th'one part, & *A.* only on the other part, now *B.* being no party to the deed can take nothing by it except by way of remainder; but if he were party to the indenture, or if the grant were by deed poll to which all men are a like parties, then it happily may enure as a future grant to *B.* This not impertinent

Now as the executors aſſent to one cannot enure to another though of the ſame thing, except by way of remainder, ſo neither can it any way where the things are not the ſame, except in very ſpeciall caſes; as if a termor bequeath a rent to *A.* and the land it ſelfe to *B*, the executors aſſent that *A*, ſhould have the rent is no aſſent that *B*, ſhould have the land; yet I thinke the aſſent that *B.* ſhould have the land, doth imply the aſſent that *A*, ſhould have the rent, 1. For that the reſtraint impoſed by the law, againſt the paſſing of a chattell by a will without the executors aſſent, being out of reſpect to the payment of the teſtators debts: now if the land ſhall paſſe to *B*, it is no more availeable to the teſtators debts that it paſſe diſcharged of the rent then charged. 2. Since the gift and bequeſt was of the land charged with the rent, therefore if this bequeſt ſhall take effect, it ſhall carry the land according to the teſtators intent, *viz.* with this charge upon it: for what elſe doth the executor in this but aſſent that the will of the teſtator herein doe ſtand and take effect,

Plowd. Com. 511. In Bret & Rigdens caſe. So of common or other profit.

effect, and consequently *B*, must take the terme according to the will, and not in any different or contrary manner.

Next we are to consider of the manner of assents by executors, which hath some affinity with the fourth point. But here we shall consider only of assents conditionall, now to this purpose we will cast our eyes upon two sorts of conditions, *viz.* precedent and subsequent. As for the former, an executor may to a legatee absolutely given assent upon a condition precedent, as thus. I am content, that if you can get & bring in to me such a bond wherein the testator stood bound unto *I. S.* that then you enter upon the terme, or take the corne or cattell to you bequeathed. So of other like conditions which may precede the assent, as if you can get the assent of my coexecutor, or if you will pay the arrerages of rent to the lessor behind at the testators death, or if you will pay the wages already due to the servants attending about the cattell or corne to you bequeathed. In this case, if the condition be not performed, there is no assent, and therefore the conditioning in this manner is good. But if it be upon a condition subsequent, as thus I doe agree, that you shall have the thing bequeathed to you, provided that you shall pay so much yearely to me, or to such a creditor of the testator, now the legatee entring into or taking the thing bequeathed, shall not lose it againe by failing to performe the condition afterwards, for the executor by his assent cannot make that legacy conditionall which the testator gave absolutely, no more then he can make that bequest to be absolute which the testator gave conditionally, except by a release made of the condition. As in other things, so in this the executors assent is like

like to the atturnement of a leſſee, which cannot be upon a condition ſubſequent, where the grant is abſolute or without condition, though yet he may to his atturnement prefix a condition precedent.

In the eighth place we are touching the bequeſt of leaſes or chattels reall, to conſider what manner of intereſt one to whom a remainder of a terme after the death of another is limited, hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is cleare that he hath but a poſſibility of remainder, for that poſſibly the whole terme may be ſpent in the life of the firſt, to whom during his or her life it is bequeathed, now a meere poſ-

90. Eliz. Fulſies caſe. ſibility is not grantable. Therefore was it reſolved in the late *Queens* time, where he in remainder granted or ſold his ſtate or intereſt to another during the time of the firſt, that this grant was utterly voyd, becauſe a poſſibility cannot be granted; but whereas ſome opinion in that caſe was delivered that this poſſibility could not be releaſed, no more then granted, it hath ſince bin reſolved that he in the remainder by his deed of grant or releaſe to the deviſee for life may make his eſtate, which before was determinable by his death to be now abſolute, ſo as it ſhall continue to his executors, adminiſtrators, and aſſignes after his death during the whole terme. It may be that what was conceived in the ſaid caſe of *Fulſey*, negatively of the validity of a releaſe by him in the remainder, might be meant or perhaps expreſſed of a releaſe to him in the reverſion; but ſurely me thinks though he could not ſurrender, yet his releaſe or defeaſance to him in reverſion or remainder having the freehold or inheritance,

Lampets caſe. Co. l. 10 fo 48.

ſhould

ſhould diſſolve or deſtroy this terme reſidue after the death of the deviſee for life, ſo as there the freehold ſhould be diſcharged thereof. But *Quæ.* for I have not knowne this in queſtion. As for the other point of *Fulſes* caſe, it was in the ſaid later caſe of *Lampet* confirmed and admitted for good law, *viz.* that this poſſibility of remainder could not be aliened nor conveyed to a ſtranger.

Now we are come to the ninth Point, *viz.* to examine whether any act of the deviſee for life can fruſtrate or defeat him in the remainder of the terme, and whether by the act of God, *viz.* the death of him in the remainder before the firſt deviſee for life ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man cut off or defeat the ſecond, though formerly it were held otherwiſe; but according to the later reſolution was it alſo held or admitted by all in the ſaid caſe of *Hamond*, where was ſuch a grant. And as this cannot be done by direct grant or alienation, no more can it by an indirect, or implyed, as by taking of a new leaſe, which is a ſurrender in law of the old leaſe, no more than by an expreſſe ſurrender. Nor doubtleſſe by outlawry, whereby the terme of the firſt deviſee is ſetled in the crowne. But if we put the caſe further of waſte committed by the tenant for life, or breach of condition by not payment of the rent or otherwiſe, theſe for the whole in the later caſe, and for the part waſted in the former, doe ſo deſtroy the leaſe, and put the reverſioner in *Statu quo prius*, as that all remainders muſt needs faile; ſo of a feoffement or other like forfeiture by fine. As for the death of him in remainder, it was urged in the caſe of *Hamond*, that ſince it was but a meere poſſibility, if it could not take effect, and become

9. *Point.*

Plowd. 510. Welcden & Elkington, 10. El. D. 277. 19 El. D. 359. Cont. 8. El. D. 253. & 33. H. 8. Bro. chatels, 23.

become an eſtate in the life of him to whom it was limitted, it could not ſettle in his executor; and to that purpoſe were cited the caſe of the Rector of Chedington, and more expreſly as reſolved in the point, the caſe of *Price* and *Atmore*. But the Court reſolved (and found former reſolutions in other Courts that Way) that the death of him in remainder did not hinder, but that it may ſettle as well in his executors upon the death of the deviſee, as it ſhould have done in himſelfe, if he had overlived the firſt deviſee for life. If the leſſor enter and levie a fine, and the deviſee for life enters nor, nor claimes in five yeares, he in the remainder may enter, as having a right futurely accrued.

Welcden & Elk. ubi ſupra. But there the point was never queſtioned, though ſuch death was there.

10. *Point* In the laſt place we intermedled only with leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken, is to be extended to, and underſtood of all other chattels reall, as wardſhip of body and lands, eſtates by extent upon ſtatutes or judgements, termes otherwiſe than by leaſe, in faires, markets, rents, annuities, commons, advowſons, and other profits; yea, one ſingle next avoidance of a Church. Now wee come to conſider of bequeſts perſonall, principally, if not only, *viz.* how ſuch may be forfeited, loſt, or revoked. Firſt then, we will conſider of the acts of the legatee; ſecondly, of the acts of God; thirdly, of the acts of the teſtator. The legatee, as from the Civilians I learne, may forfeit his legacie by his miſ-carriage towards the Will: as if he uſe means to have it concealed and kept from being knowne, and conſequently proved. So if he accuſe it of falſitie. So againe, if he deface or deſtroy the Will. Alſo if being by the Will appointed to be tutor or educator of a child, he

Of forfeiture, revocation and other loſſe of legacie.

Swinb. de teſtam. 352, 353. Except as tutor or guardian he accuſe it.

he refuſeth ſo to be; ſo ſaith Maſter *Swinborne*: but *Silveſter Prierius* ſeemes to me oppoſite in that where he ſaith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non eſt conditionale, ſed modale*; ſo as he takes away the force of a condition from words conditionall, whereas the other without words conditionall raiſeth a condition implyed. Laſtly, if the legatee preſume too farre upon the ſtrength of the bequeſt to him, ſo as hee taketh the thing bequeathed without the conſent of the executor; thus alſo doth he forfeit his legacie, ſaith Maſter *Swinborne*, unleſſe the teſtator did will and appoint he ſhould ſo doe. The falling into enmity with the teſtator, will be conſidered of more fitly, as I take it, among the acts of the teſtator. In the next place let us ſee what acts of God ſhall cauſe a legacy not to take effect; firſt thus, If the legatee die before the teſtator, this legacy is loſt, and his executor ſhall not have it: So alſo ſaith Maſter *Swinborne*, if it be appointed to be paid after the death of the executor, and the legatee dieth before the executor, it is loſt; and ſo alſo if he die before the condition performed, ſaith he; Let us come now to time of payment, and death before it. If there be a day certaine limitted for payment, and the legatee dye before that day, his executor ſhall have the legacie; contrariwiſe, if the payment were limitted to be made when the legatee ſhould be married: but if it were onely expreſſed to be towards the marriage of the legatee, and ſhee die before marriage, her executor ſhall have it, ſaith *Swinborne*. Now put the caſe that a legacy is bequeathed to *B* to be paid when he ſhall be five and twenty yeares old, and *B* dyeth before that age, it ſhall now be paid to the executor, and that preſently without ſtaying

Sum. Silv. 284.

De teſtam: 252.

De teſtam. 255.

Vide Bro. Deviſe 27. & 45. there were divers daies of payment, and the deviſee dyed before the laſt; his executor ſhall have it. 14. vel. 24. H. 8. 36. H. 8. & 3. El. Dyer. 59. See this difference.

staying till *B* should have been of that age, saith *Prier*. Nay, saith *Swinborne*, if the words of the Will be so, *viz*. when hee shall come to such an age, then if he die before, his executors shall not have it at all, but if the bequest be generall; and further it is added in the Will, that the testator would have that legacy paid the legatee at such an age there though he dye before such age, yet his executors shall have the summe bequeathed. The difference may seeme very nice, yet happily it wants not some probable colour of reason. Now lastly, let us come to the testators owne act, who clearly hath power to revoke or countermand any legacy, though he revoke not the rest of the Will; and here first of revocation presumed. If there fall out *Graves inimicitiæ inter legantem & legatarium, legatum caducum efficitur*, saith the Summist; *Sed non propter leves*, saith he, *& si graves, si tamen redeant ad amicitiam, reintegratur legatum*, that is, by grievous enmity after arising, and never reconciled betweene the testator and legatee, the legacie is dissolved, otherwise of a light breach, or falling out, though it continue untill the death of the testator. This I conceived to be rather fit for this place, as an act of the testator, than to be reckoned or registred amongst the acts or forfeitures of the legatee, for that it is not by the summist made materiall, or any point of difference, whether the legatee gave just cause of offence, or that the testator unjustly conceived displeasure, and so grew into causeless enmity. Therefore also doe I hold it of the nature of a revocation implyed or presumed, for that although no revocation be made, yet since the testator hath ceased to beare good will to the legatee, he cannot be intended to will him good, nor consequently to be of the same mind,

Sum. Silv. 283. According hereto; vide Dy. ubi supra, per majorem opinionem Justiciar.

Acts of the testator.

Sum. Silic. 285.

mind, touching the benefitting of him, as he was when he made his will: yet here again it is worth the conſideration whether the circumſtance following may not make a difference in the caſe thus, that where the teſtator dyeth ſhortly after the breach and enmity growen, and before he come to the place where his will is, or at leaſt to opportunity of peruſing and reforming the ſame: There this very alteration of affection ſhould make an alteration in the will, and a revocation of the amicable bequeſt. But where he living a good ſpace after, and comming to the place where his Will was, and ſpecially if he doe againe peruſe it, and yet doth not croſſe nor expugne that bequeſt, here it may be preſumed that either his enmity ceaſed, or that ſo farre as to continue this bequeſt, the charity or other motives inducing him to make it, ſtood unvanquiſhed and not extinguiſhed by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and cauſing it to be atteſted by witneſſes, though the teſtator live divers yeares after, doth ſtrongly argue his intent not to continue, that what was done in an extremity ſhould ſtand as his will: ſo on the contrary, the permitting of a bequeſt expreſſed in a written will, to continue without any croſſing, blotting, or defacing, may argue againſt contrary preſumption, the teſtators mind, that it ſhould continue as part of his Will. But now let us conſider of more expreſſe revocation, and to that purpoſe will I relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Maſter of the Rolls, three Judges, and two Doctors, Maſters of the Court; Betweene *Robert Eyre* and

and *William Eyre* complainants, and *Heſter* late wife of *Chriſtopher Eyre* their brother, and now wife of Sir *Francis Wortley*, Defendant; Thus was the caſe. The ſaid *Chriſtopher Eyre*, 15. *Iacobi*, by his laſt will and teſtament giveth and bequeatheth to the ſaid *Robert Eyre*, his brother, an hundred pounds, and to the ſaid *William*, his brother, a thouſand pounds, and gives to the ſaid *Heſter* his wife all the reſidue of his eſtate, and makes and ordaines the ſaid *Heſter* his ſole and only executrix, ſaving for the performance of his Will, ordaines *Robert Eyre* and *William Eyre*, his ſaid brothers, whom he intreats to joyne as executors in truſt with his wife, for the better performance of this his laſt Will. Afterwards, 5. Jan. 1624. being ſick of the ſickneſſe whereof he dyed, he was moved by Maſter *Damport*, and Maſter *Stone*, to ſettle his eſtate; to which motion he yeelded, and Maſter *Stone*, and Maſter *Damport* did demand of the ſaid *Chriſtopher*, what friend he thought fitteſt to be his executor, and to whom he would commit the care of diſcharging his funeralls, and performing his Will, whether he truſted any perſon more than his wife, to bee his executor? To whom he anſwered, That his wife was the fitteſt perſon for that purpoſe, and therefore ſhould bee his ſole executrix, and then the teſtator was moved by M. *Stone* to give, and bequeath legacies to his father, to his brethren, and to his kindred, whereupon hee anſwered hee would give or leave them nothing, and being further put in mind to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty ſhillings; and being thereupon moved by his wife to give his ſaid God-ſon more, or a greater legacie, or the like in effect; ſaid, thou knoweſt

knoweſt not what thou doeſt, doe not wrong thy ſelfe, twenty ſhillings, or thirty ſhillings is money in a poore bodies purſe, or the like in effect, and the reſt, he left them to his wives diſcretion or diſpoſition, and the ſaid teſtator did ſpeake the words aforeſaid, or the like in effect, *Animo teſtandi & ultimam voluntat. declarandi*, as the witneſſes then preſent did conceive.

This Will was proved by the oath of the ſaid *Heſter*, and this *Codicell* being pleaded as a revocation of the ſaid bequeſts: The ſaid Maſter of the Rolls, Judges, and Doctors were by the Lord Keeper, and the order of the Court deſired to reduce the matter upon the Will, and *Codicell* into a caſe, and to certifie their opinions, whether the ſaid *Codicell* were a revocation of the legacies given to the plaintiffes or not. And they after counſell heard at ſeverall times, *viz.* both common Lawyers, and Civilians, and many houres ſpent in conference together did finally reſolve with one unanimous conſent, that the legacies to the plaintiffes given were not by the ſaid *Codicell* revoked, and ſo certified under their hands, upon reading whereof 25. *Novembr.* decree being reſolved to be made, if cauſe were not ſhewed to the contrary, 27. *Novembr.* on which day the defendants Counſell before the Lord Keeper in the preſence of the Maſter of the Rolls, and the ſaid three Judges, and Sir *John Heyward*, alledging what they could in ſtay of the ſaid decree: It was by a generall concurrence of opinion decreed, that the legacies given to the ſaid plaintiffes, ſhould be to them paid on our Lady Even, with twenty Nobles in the hundred for the detainment thereof. Ord. 27. Jun. a. 2. Caroli regis.

This caſe I thought fit to relate ſomewhat at large, becauſe it pitcheth upon the point of revo-

cation without plaine, full, and expreſſe termes. And ſurely as Wills are to be made out of diſpoſing memories, and underſtandings, ſo alſo with deliberate, and adviſed judgements, and therefore by like reaſon not to be countermanded or revoked by ſick, or ſleight expreſſions. And this ſeemes to me very agreeable with the rule, and reaſon of the common Law. For as reaſon it ſelfe doth dictate that *Nihil tam conſentaneum eſt æquitati naturali, quam unumquodque diſſolvi eodem modo quo conficitur*; So hath the common Law of *England*, in my underſtanding reſolved; as for the purpoſe, if the King preſent a Clerke to a Church, and he is thereupon admitted, and inſtituted thereunto: Now yet before induction may this bee revoked as a will may. Yet if the King ſhall after, and before induction preſent another man to this Church without an expreſſe repeale or countermand of the former preſentation, it ſhall not hereby be revoked. So if lands were conveyed to certaine uſes, with a clauſe or power of revocation; the ſale of the ſame to another did not revoke the former. But if a ſtate were meerely at will, then the conveyance to another by the common Law, amounted to a revocation. Therefore was the Statute made *tempore Henrici* 8. to redreſſe this, *viz.* that where the King had granted lands, or other things to one during his pleaſure, this ſhould not be revoked by a grant to another without recitall of the former, and declaration that the King had determined his pleaſure.

To help this was the ſtat. made 27. El. cap. 4.

6. H. 8. ca. 9.

Being now to conſider of relation in the executors aſſent, it is meet that ſince theſe diſcourſes are principally intended, for thoſe who are not grounded Students in, or profeſſors of the Law, that we ſhew what we meane by relation, or what

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it is in Law. Thus therefore bee it conceived; that relation is a kind of fiction in law, making a thing done at one time to be accepted, and repuld, or to have its operation, as if it had been done at another time past. As for the purpose. *A.* doth bargaine, and sell freehold lands to *B.* in *August* by indenture which is not inrolled untill *October* following, yet this hath such relation to the date of the indenture, that if *A.* after that, and before the inrolment become bound in a Statute, or granted a rent charge, or made a lease for yeares, or tooke a wife, or committed felony, yet shall none of these be of any force to charge or prejudice the state of *B.* for that the Law adjudgeth him now owner by relation as from the time of the date: yea, if a servant departing in *August*, for some great breach with his Master, doe kill his Master in *October*, this is in law petty treason, as if he had continued servant when he did the fact, because it relates to the malice conceived when hee was his servant. Now then having shewed that a terme or other chattell reall or personall, passeth not, nor is transferred in property to the devisee untill the assent of the executor be thereunto had; we now put the case that this assent is not had till a yeare, or some such good space after the testators death, and make our question whether this shall have relation to the testators death, *viz.* to be in the laws account as if it had then been. Or perhaps to some purposes so to stand, and to others not so. That this is usefull, and materiall to be knowne be it thus shewed. One bequeatheth his terme of tithes of an advowson of an house or land by him first leased to an under-tenant for rent, and dyeth in *May*, the executor assenteth to the bequest in *October*, betweene which two times tithes be set

out, the Church becommeth void, rent groweth payable; now if this aſſent ſhall relate to the teſtators death, the deviſee ſhall have theſe, elſe not; the like caſes may bee put of the brood of Cowes, Mares, and Ewes, fallen betweene the death of the teſtator, and the aſſent, ſo alſo of fleeces, of ſheepe ſhorne, &c.

Now to come to the point, it is reported by the Lord *Cooke*, to have beene held in the late Queenes time, that this aſſent ſhall as betweene the executor, and the legatee, have relation to the teſtators death, yet ſo that if the executor before his aſſent to the deviſee of a leaſe committed waſte; now the action of waſte ſhall bee brought againſt the executor, in the *Tenuit* for the waſte done before, and not againſt the deviſee in the *Tenet*. But put the caſe that the legatee, before the executors aſſent, granted the terme to *I. S.* now if to any purpoſe this aſſent ſhall have relation, it ſhall certainely ſo bee to make good this grant, as making the legatee to be eſtated, and conſequently able to grant before the executors aſſent; yet doe I not finde any opinion or reſolution in the Point, but finde it debated at the Barre in the late Queenes time, betweene *Puckering* and *Egerton*, in the caſe of adminiſtration granted to *A.* after her grant a free terme, left by her inteſtate husband; but I finde no reſolution therein, nor perhaps wants there materiall difference betwixt that caſe, and the other: for there the deviſee had at leaſt an inception of title by gift of the owner, wanting onely a circumſtance of aſſent to perfect it: but here this woman till adminiſtration had not ſo; unleſſe perhaps the Statute 21. of King *Henry* the eight, directing or enjoyning Ordinaries to grant admi-

Tr. 41. Eliz. Co. lib. 5. fo. 12. B. Sanders caſe.

Vide Plow. com. of an action of treſpaſſe againſt a ſtranger for taking before aſſent. 280. b.

P. 25. Eliz.

adminiſtration ſhall amount to a kind of title, *ad rem*, though not yet *in re*. But to returne to the Point of aſſets; where a reverſion is granted by deed or fine, if the leſſee a good time after doe atturne, this ſhall have no relation to the time of the grant; So as for waſte committed or rent growne due betweene the grant and atturnement, the grantee can have no remedie. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the aſſent of the executor, before the ſale or gift well teſtified, or if the aſſent bee not had till after, let him take a new gift, that hee may not reſt in a doubtfull caſe, for beſides the premiſſes that great legift, Sir *Edward Cooke* when hee was a practiſer to Maſter *Stubbes* of Norfolke, for his Sea gave his opinion, as I have been confidently informed, that where a leſſee, for yeares, being outlawed did grant his terme, and after reverſed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant, and this hath much affinity with the principall point, for there if the relation helpe not, the grant is not good from the legatee. 48.E.3.15.

Divers caſes of bequeſts conſidered, and expounded.

IF a termor of an Houſe, bequeath his Houſe to *B.* without expreſſing how long he ſhould have it, he ſhal have the whole terme, and number of yeares. So of land. 14. Eliz. Dy. 307. conte. in a grant. 31. Eliz.

Alſo by the name of the Houſe, the Orchards, Gardens, and Backſides doe paſſe: yea if the Houſe with thappurtenances be bequeathed thereby, the lands belonging to the Houſe or uſed

with it doe paſſe, though yet they would not ſo doe, by ſuch words in any leaſe, deed, or grant, yet by ſome Civilians or Canoniſts, the Orchard belonging to an Houſe ſhall not paſſe by the only gift of the Houſe without ſome words, ſhewing the intent of the Teſtator ſo to be; or except one gate or doore lead as well to the Orchard, as to the Houſe, but ſome other of them hold that it doth paſſe without any ſuch help of circumſtance, ſo as it be adjoyning to the Houſe.

Sum.Silv. 286.

If a leſſee for yeares give his terme by his will to *A.* he ſhall have it without paying any rent, for the Executors ſhall pay it for him, as I find in the Summiſt, but againſt reaſon me thinkes.

Ibid. ut ſupra.

If one bequeath his indenture of leaſe, his whole ſtate in that leaſe paſſeth. So if one bequeath his obligation or other ſpecialty, the debt or duty it ſelfe ſhall goe to the legatee; and by the Canon or civill law the very action it ſelfe paſſeth, *viz.* as I conceive, ability to ſue the debtor in his owne name; but in our law it is otherwiſe, the ſuit muſt be in the executors name, for a debt or thing in action cannot be aſſigned except by or to the King, and only at the common law is the debt recoverable; but the Spirituall Court may force the executor to ſue or let his name be uſed in the ſuit for and by the legatee.

Ibid. ut ſupra.

Yet 48.E.3 14.15. It is admit. that ſuch a diviſee of all goods after debt paid, ſhall have a duty reſting in account.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corne, nor fruit growing on the ground, nor ſtone, nor timber prepared for building, as the Canoniſts and Civilians hold.

On the other ſide, if one bequeath the moiety of all his goods, the legatee ſhall have only the moiety of that which remaines after debts payed, for that only is to be accounted the teſtators

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which he hath *ultra æs alienum.*

By a bequeſt of all utenſils or houſeholdſtuffe, plate nor jewels are not given. Quæ. 36.H.8.

If one bequeath to his wife all her apparell, ſhe ſhall not have as ſome Civilians ſay, her ornaments of gold or ſilver, by which is meant as I take it, chaines, jewels, bracelets, rings, &c. but others are of contrary opinion, except they be ſuch things as are not lawfull for her to weare. Dy. 59. Dy.ib.ſupra. Sum.Silv. 286.

If a Bed be given by a will, *Venit ornamentum ejus*, ſaith the Civilian, that is, the furniture thereof paſſeth, *viz.* not only the bed, bedſteed, bedcloaths, but alſo the Curtaines and Valens, as I take it. But I think that by gift of a Coach by will, the Coach-horſes paſſe not, yet perhaps the furniture of the Coach-horſes may paſſe as appertenant to the Coach, for ſo I think they ſhall doe, rather then by bequeſt of the Coach horſes without the Coach. Ibid.

If one bequeath to *A*, meat, drinke, and clothing, or *alimenta*, he ſhall have, ſaith the Civill law, alſo lodging, habitation, and all things neceſſary for the maintenance of life, *viz.* as I take it, fire and waſhing, &c. Ibid.

If one bequeath to his daughter ten pounds a yeare for her apparrelling, and ſhee demandeth none in foure yeares, now ſhall ſhe not after that time have the arrerages of this ten pounds by yeare for the time paſſed. Ibid.b.

If a man bequeath one of his horſes or Cowes, not naming which, to *I. S.* he is to chuſe which he will, ſo it be not the beſt of all, ſaith the civill law, and perhaps the mention of that exception growes out of reſpect to the hariot, which the Lord ſhould have, or the mortuary which the Parſon ſhould have. Ibid.

Ibid. A man bequeathes thirty peeces of twenty ſhillings to *A*, twenty to *B*. and ten to *C* to be had in ſuch a Cheſt or Casket, and it is found after his death, that there bee but thirty in all in that casket or box, now each ſhall be abated ratably, ſaith my ſummiſt, ſo as *A*, ſhall have fifteene, *B*. ten, and *C*. five, and this ſtands with good reaſon and juſtice, for ſo each hath a proportionable part. And it were reaſonable, that it were by Parliament eſtabliſhed for law, that all both legatees and creditors ſhould be payed in like proportion, where the ſtate will not ſuffice for full payment of each, rather then that an executor ſhould have power to pay one all, and another nothing, yet if the teſtator left ſufficient to make good all thoſe ſixty peeces bequeathed, *Quæ*. if that which is wanting in the casket ſhall not be ſupplyed and made up, for if the caſes following found with the ſame author be good law, it ſhould ſeeme ſo to be.

Sum. Silu. p. 286. If one, ſaith he, bequeath to *I. S*. that which is another mans, and whereto the teſtator hath no right, then ought his executor to buy it, and give it to the legatee, or elſe ſatisfie him to the full value, and this not only by the civill, but alſo by the cannon law, and in *foro conſcientiæ*, ſaith my author.

Ibid. 287. Againe, if *A*, bequeath to *B*. ſuch an horſe by name, and after ſell away that horſe, and dyeth, now is his executor bound to anſwer the value thereof to *B* ; and if the teſtator after his ſale of that horſe had bought another, and called him by the ſame name as the firſt, now ſhall this later horſe paſſe to *B*, ſaith the booke, except it can be proved that the teſtator ſold the former horſe of purpoſe to revoke his will touching that bequeſt.

Ibid. 286. So again find I, that if one having but a moiety

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or one halfe of Green cloſe, or of a ſtack of corne, or other chattell, doth give the whole, ſo as the words be apparant to reach to more then his moiety, then muſt the executor buy out the others part for the legatee, or give him the value; but if the words be but generall ſo as they may be reaſonably ſatisfied with the teſtators part, no ſupply ſhall bee made. So alſo if one having goods in pledge bequeath them, it ſhall be conſtrued to extend no further than his right.

A bequeſt is made of an hundred pounds to be paid at a future time, *viz.* divers yeares after the teſtators death; a queſtion is made by the Summiſt, whether the profit of the money in the meane time, ſhall go to the legatee or the executor, and hee reſolves with this difference, if the day were given in favour of the legatee being an infant, who could not ſafely receive it any ſooner, then he ſhall have the profit; but if the reſpite of payment were in favour of the executor, then ſhall the legatee have but the bare ſumme without any addition of meane profits. Ibid. 284. a.

If one bequeath all his terme or goods to his executor for payment of his debts, or debts and legacies, it is a void bequeſt, becauſe it is no more than the law would ſay, if hee had ſaid nothing. So if it be generally to performe his will. 15. Eliz. Dy. 331. Plow. Com. 545. b.

If one ſeized in fee-ſimple of land, bequeath it to his executor to pay debts, the executor hath no ſtate of free-hold; for if he ſhould, then it muſt be either for life, which might end by his quicke death before debts payed, or in fee-ſimple, which would carry away the land for ever from the heire, where perhaps a few yeares profits might ſuffice to ſatisfie the debts, yea, then by the death of the executor the land ſhould deſcend to his heire, Co. lib. 8. 96. a.

heire, and not goe to his executor, who would be executor of the first testator.

By deed or word in life.

4. E. 6. Bro. Done, &c. 43.

If one give or grant all his goods, having leases for yeares as well as moveables, the leases shall not passe, as was held in the time of King *Edward* the sixt. And so also was it admitted in *Portmans* case, for the word *Bona* conprehendeth onely moveables by the better opinion there. But the point in that case was pertinent to this place, *viz.* a bequest in a Will of all the testators goods, and whether thereby a lease for yeares passeth or not, was divers times debated, but not resolved, the Judges differing in opinion in that point, but in another point which made an end of the case, all agreed. Yet the better opinion was as I find in my report, that a lease would passe by such words in a Will, though not in a deed or grant by word otherwise made, for that legacies are demandable in the Spirituall Court, where *Bona & catalla* are taken for all one. See also the state of *Marlbr.* giving an action to the successor, *Ad repetenda bona prædeceſſ.* Yet an *eject. custod.* hath been maintained thereupon: so also upon the statute for executors, *de bonis asportatis in vita testator.* hath it been resolved, and where administration is granted, it is only *omnium bonorum*, without speaking of chattells, yet hath the administrator interest in leases as well as moveables. On the otherside the *stat. de prerog. reg.* mentioning only forfeiture *de catallis* is cleerely extended to moveables, so also in the writ of assize *De catallis quæ in eo capta fuerint*, and in the writ of execution upon a statute, there is onely the word *catalla*, and not *bona*, and in the case reported by *Kelway temp. Henry* the seventh, it seemes *bona & catalla* were taken for *synonyma*, or all one. It doth not appeare that these statutes and

Tr. 37. El in ba. reg. Portman. ver. Simmes or Willis, divers times argued.

Cap. 28.

4. E. 3. c. 7. So the stat. 5. R. 2 ca. of forfeit. of goods by those who goe beyond the Sea. Cap 16.

In all these goods are comprehended.

13. H. 7. Kelw. rep. 35. a.

writs

writs were alledged or considered of *temp. Edw.6.* but in *Portmans* case the most of them were.

If one will that his wife or any other shal have, or hold, or enjoy the moiety of his lease with his executor. This implyeth not that the executor have the other moiety as a legacy also, but otherwise as the law casts it upon him, no more than where the moiety of fee-simple land is devised to the younger son, this shall not make the elder son to have the other moiety otherwise than by discēt, as betweene *Low* and *Charter* was conceived. But there being a *Proviso* in the wives bequest, that if shee married from the house, then &c. *Popham cap.* Justice held, that if she married at all, this was a marrying from the house, for shee was no longer widdow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.

Low and Carters case Tr. 37. Eliz. in ba. reg.

Chap. XX.

Of the Executor of an Executor.

I Should be taxed of omission, if I should not shew whether the things fore-spoken of executors immediate, extend also to the mediate or more remote executors. Assuredly, were I not by the bookes otherwise informed, I should think it somewhat strange, that the mediate executor in the fourth, fifth, or further degree should not by the rules of the Common-law, stand in like plight executor to the first testator, as the first and immediate executor, as well as the heire, and assignee in the third or thirteenth degree is capable of all advan-

See Plow. 184. a debt against the executor of an executor.

19. Ed 2. & 14. Ed. 3. Fitzh. Executor 87. & 103.

advantages in like ſort as the firſt and immediate heire, and aſſignee. And indeed we finde both in the time of *Edward* the ſecond, and *Edward* the third, execution ſued out upon a judgement, and ſtatute by an executor of an executor, and why he might not as well maintaine an action of debt, &c. I ſee not. But I muſt confeſſe, I find both books to the contrary before any ſtatute made in the point, and after an act of parliament to enable them to bring actions, and to make them ſubject to actions, yet the ſtatute ſpeakes nothing of conferring upon them the teſtators goods. Now if they had title to them before that Statute, and without the helpe of that Statute, it is ſtrange if they ſhould not bee ſuable for debts. But ſince that Statute, and at this day where by a will a ſpeciall truſt is recommended to an executor, as to ſell land, &c. This not performed in his life time, ſhal not be performable by his executor, contrariwiſe of an intereſt, as to take the profits of lands for certain years towards payment of debts, and legacies: and where the ſtat. *temp. H.*8. gives remedie to executors for recovery of rents of inheritance behind in the teſtators life, I doubt not but executors of executors are within the equity as well as within the ſtat. 9. *Ed.* 3. *cap.* 3. that the executor who appeares at the grand diſtres ſhall anſwere alone. Yet the ſtatute *Weſtm.*2. *cap.*23 for executors was taken not to extend to executors of executors. *Quod non eſt lex.* So as now in all caſes except of ſpeciall truſt or authority, without the office of executorſhip, The executor of an executor, how farre ſoever in degree remote, ſtands as to the points both of being, having, and doing in the ſame ſtate and plight as the firſt and immediate executor.

11. Ed. 3. & 13. Ed 3. Fitzh. Ex. 78 9.

25. Ed 3. c. 5.

19. H. 8. 9. 10.

4. El. Dyer. 210. 32 H. 8. cap 37.

So 32 H. 8. 28. leafes. And 32. H. 8. cap 34. Conditions, & 13. El. cap. 5. & 27. El. 2. can. 4 Of fraudulent conveyances.

21. H. 8. cap. 15. for falſifying recoveries.

39. H. 6. 45.

7. E. 3. 62.

CHAP.

Chap. XXI.

Touching Adminiſtrators:

OF theſe alſo as ſtanding in much affinity with executors, it may be by ſome expected that I ſhould have treated. But firſt my excuſe is, that theſe of executors only having growne to ſo great a bulke above expectation, I was unwilling to inlarge it further. Secondly, that which in the points of having, and doing is before ſet forth, and ſhewed touching executors, may be applied to, and underſtood of adminiſtrators, though not what is ſpoken of being, and unbeing, or revocation of executorſhips, and other circumſtantiall points.

Laſtly, I may perhaps, if theſe find good acceptance, adde ere long that which appertaineth to adminiſtrators diſtinguiſhed from executors, or wherein they ſtand in different ſtate.

Chap. XXII.

Considerations in conscience touching payment of Debts, Legacies, and the preferring or respect of persons.

TO the advertisement what course executors are to hold in their payments, I thought good to adde this in *foro conscientiæ*. That when as it shall stand in the executors will and election to pay whom hee will, and as hee will, in respect of equalitie in the dignity and degree of the debts, all being for the purpose by the specialtie, and none of record, and yet he hath not wherwith to pay or satisfie all; Here he may have three wayes or courses in his eye.

1. Firſt, where there is equality in the honesty and conscience of the debts; there except in the abilitie of the parties to beare losse, the disproportion may otherwise occasion, me thinkes it should bee most honest and just to pay every one proportionably, and to let the losse of every one to bee equall: and the justnesse of this is taught by the law, which gives the *audita querela* for equall contribution in bearing of losse by them who stand in equall degree: so of legacies.

2. The poverty and inability of some, and the plenty of others, may in *foro conscientiæ* justifie the paying more to one, and suffering him to lose lesse (if any thing) than another. For as the widowes mite was a greater gift, so a greater losse than more out of abundance. Where charity findes or or may find place or neereneſſe to place of giving,

it

it may finde greater motives of preſerving from loſſe, ſo of legacies.

The nature of the debts, and ſo ſometimes of legacies, may be ſo different, as thence may ſpring a juſt motive to diſproportion payments, to pay more to one than another, rate for rate, and ſo to ſuffer one to loſe more than another. One debt may perhaps be uſe for money, or at leaſt money lent for uſe, another may bee money freely lent. Another debt for land of inheritance bought; another debt for a leaſe, chattels, or moveables, come to the executor. The firſt merits the leaſt reſpect, next the ſecond, then the third, and the laſt the moſt. But where without any of theſe motives there is not equality held in payment, *Peccatur* (as I think) *in conſcientiam.* But let every one ſtand or fall by, or to his owne, or to him who is greater than his conſcience. This equality Saint *Paul* in another caſe recommends to the *Corinthians.* And *Salomon*, whileſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equall diviſion of the childe betweene the mothers, who were joynt claymers and competitors for it. 3. 2 Cor. 8. 14.

See more of Conſcience, *Doct.* and *Stud.*

FINIS.